TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 258

CENTRAL PACIFIC RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, PETITIONERS,

vs.

COUNTY OF ALAMEDA, CHAS. W. HEYER, RALPH RICHMOND, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JULY 24, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(36,072)

(36,072)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 258

CENTRAL PACIFIC RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, PETITIONERS,

vs.

COUNTY OF ALAMEDA, CHAS. W. HEYER, RALPH RICHMOND, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Original	Print
Proceedings in supreme court of California	1	1
Caption.....(omitted in printing)..	1	
Record from superior court of Alameda County	2	1
Complaint	2	1
Answer and cross-complaint	14	8
Answer to cross-complaint	35	20
Findings of fact and conclusions of law	37	22
Judgment	53	31
Clerk's certificate.....(omitted in printing)..	64	
Notice of appeal	65	37
Bill of exceptions	66	37
Testimony of H. F. Harrold	67	38
Plaintiffs' Exhibit 6—Plat	70a	40
Defendants' Exhibit "B"—Proceedings relative to proposed road No. 247, embracing:		
(1) Petition for road No. 247, filed November 9, 1858	90	54

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1931

	Original	Print
(2) Field notes for road survey No. 247, filed May 27, 1859	92	55
(3) Plat of survey for road No. 247, filed May 27, 1859	98	60
Defendants' Exhibit "C"—Minutes of board of supervisors relative to proposed road No. 247, embracing:		
(1) Order of board of supervisors to notify land owners on petition for road No. 247, dated November 9, 1858	98	61
(2) Order for survey for road No. 247, dated February 8, 1859	99	61
(3) Order declaring road 247 public highway and directing road commissioners to open highway forthwith, dated May 3, 1859	100	62
Testimony of Israel Richards	101	62
G. W. Buttner	114	71
Frank L. King	126	79
George A. Posey	129	81
Defendants' Exhibit "D"—Topographic sheet of Pleasanton Quadrangle	132a	84
Defendants' Exhibit "BB," embracing:		
(1) Petition for abandoning county road No. 247, filed September 12, 1910	158	101
(2) Viewers' report abandonment of county road No. 247, Alameda County, filed March 6, 1911	162	103
(3) Resolution abandoning portion county road No. 47, filed March 27, 1911	165	104
Plaintiffs' Exhibit No. 18, embracing:		
(1) Petition for county road 689, filed June 19, 1865	167	106
(2) County surveyor's report upon petition for road 689	169	107
Testimony of H. F. Harrold (recalled)	171	108
Assignments of error	178	112
Specifications of insufficiency of evidence to sustain decision	181	114
Stipulation as to bill of exceptions	183	115
Certificate to bill of exceptions	183	115
Stipulation as to transcript	183	115
Order transferring cause from district court of appeal	186	116
Opinion by the court and judgment	187	117
Order denying rehearing	200	135
Clerk's certificate (omitted in printing)	201	
Order allowing certiorari	202	136

[fols. a-1] [Caption omitted]

[fol. 2]

IN SUPERIOR COURT OF ALAMEDA COUNTY, DEPT. 6

No. 83010

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiffs,

vs.

COUNTY OF ALAMEDA, a Body Politic and Corporate; Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats, and William J. Hamilton, Members of the Board of Supervisors of the said County; John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow, and Frederick Stow, Defendants

COMPLAINT—Filed May 23, 1925

In Suit to Quiet Title, for Injunction, and for Restoration of Possession

The plaintiffs above named for cause of action against the above named defendants allege as follows, to-wit:

I

The plaintiff, Central Pacific Railway Company, is and [fol. 3] at all times herein mentioned it was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Utah and duly authorized to own, possess and control real property within the State of California.

II

The plaintiff, Southern Pacific Company, is and at all the times herein mentioned it was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Kentucky.

III

The defendant, the County of Alameda, is and at all the times herein mentioned it was a body politic and corporate duly organized and existing under and by virtue of laws of the State of California, and the defendants, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton are the duly qualified and acting members of the Board of Supervisors of said County of Alameda.

IV

The plaintiff, Central Pacific Railway Company, is the owner of the following described land, situate in the County of Alameda, State of California, to-wit:

[fol. 4] A strip of land 66 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the line dividing San Joaquin and Alameda Counties, distant thereon North 63.1 feet from Engineer Station 414 plus 70.2 of the Central Pacific Railway Company's main line from Oakland to Tracy, and which point is East 328.5 feet and North 2550.9 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 66 degrees 47′ West, 315.9 feet; South 25 degrees 41′ West, 88.1 feet; South 68 degrees 55′ West, 49.6 feet; North 79 degrees 02′ West, 259.2 feet; and South 89 degrees 23′ West to a point on the southerly right of way line of the said Central Pacific Railway Company, which bears South 28 degrees 03½′ West, a distance of 200.0 feet at right angles from Engineer Station 405 plus 92.4.

A strip of land 40 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the County Road leading from Sunol to Stockton by way of Patterson Pass which bears South 20 degrees 0′ West, 85.5 feet at right angles from Engineer Station 408 plus 31.7 of the Central Pacific Rail-
[fol. 5] way Company's main line leading from Oakland to Tracy, said point of commencement being also North 2627.5 feet and West 300.75 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 64 degrees 27′ West, 203.6 feet; North 58 degrees 08′ West, 153.1 feet; North 56 degrees 36′ West, 150.6 feet; North 41 degrees

44′ West, 289.5 feet; North 31 degrees 19′ West, 193.3 feet; North 19 degrees 19′ West, 295.7 feet; North 6 degrees 31′ West, 283.2 feet; North 1 degree 18′ East, 351.4 feet; and North 23 degrees 47′ West, 402.62 feet to a point on the southerly right of way line of the said Central Pacific Railway Company, which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 386 plus 53.6; thence continuing on the same course North 23 degrees 47′ West outside the right of way of the said Central Pacific Railway Company, 470.41 feet to a point on the said southerly right of way line which bears South 59 degrees 11¾′ West, a distance of 200.0 feet at right angles from Engineer Station 381 plus 17.3; thence continuing on the same course North 23 degrees 47′ West inside the said right of way 722.07 feet; North 35 degrees 22′ West, 284.3 feet; North 49 degrees 32′ West, 289.6 feet to a point on the said south-
[fol. 6] erly right of way line which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 368 plus 13.1; thence continuing on the same course North 49 degrees 32′ West outside the said right of way 565.0 feet and North 24 degrees 30′ West, 92.6 feet to a point on the said southerly right of way line which bears South 33 degrees 55¾′ West, a distance of 200.0 feet at right angles from Engineer Station 360 plus 81.8; thence continuing on the same course inside the right of way line North 24 degrees 30′ West, 71.6 feet; North 3 degrees 04′ East, 177.8 feet; North 20 degrees 24′ East, 41.9 feet, and North 37 degrees 31′ East, 163.2 feet to a point on the northerly right of way line of the said Central Pacific Railway Company, said point being North 1592.7 feet and East 63.9 feet of the corner common to Sections 29, 30, 31 and 32, Township 2 South, Range 4 East, M. D. B. & M., and 200.0 feet at right angles northeasterly from Engineer Station 359 plus 45.2.

A strip of land twelve (12) feet in width being six (6) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point on the center line of County Road #4974 which bears North 10° 35′ West a distance of 59.9 feet northerly at right angles to center line of track from Engineer Station 996 plus 70.0 of the Central Pacific Rail-
[fol. 7] way Company's main line leading from Oakland to Tracy, and which point is 9325.4 feet West and 2174.0 feet

North of the southeast corner of Section 12, Township 4 South, Range 1 West, M. D. B. & M.; thence South 86° 29′ East 113.6 feet; thence North 52° 30′ East 82.3 feet; thence North 0° 31′ West 73.7 feet; thence North 38° 11′ West 57.8 feet to a point on the northerly right of way line of the said Central Pacific Railway, said point being 200.0 feet at right angles northerly from center line of track at Engineer Station 998 plus 15.8.

A strip of land twenty (20) feet in width being ten (10) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point which bears North 10° 35′ West a distance of 200.0 feet at right angles from center line of track at Engineer Station 993 plus 02.5 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, said point also being 9712.5 feet West and 2244.2 feet North of the southeast corner of Section 12, Township 4 South, Range 1 West, M. D. B. & M.; thence South 69° 41′ East 200.8 feet; thence South 89° 52′ East, 249.5 feet; thence South 39° 41′ East 105.0 feet; thence North 88° 03′ East 223.15 feet; thence South 71° 48′ East 176.15 feet; thence North 85° 18′ East 263.97 feet; thence North 59° 50′ East 221.95 feet; thence South 77° 22′ East 159.52 feet; [fol. 8] thence North 58° 08′ East 161.87 feet to a point on the southerly right of way line of the said Central Pacific Railway, which is 200.0 feet at right angles southeasterly from center line of track at Engineer Station 1008 plus 52.4; thence leaving the right of way but reentering at a point on the said southerly right of way line which is 200.0 feet at right angles southwesterly from center line of track at Engineer Station 1018 plus 72.3; thence inside the said right of way North 69° 10′ East 204.0 feet; thence South 62° 19′ East 138.5 feet; thence South 13° 19′ East 124.2 feet; thence South 5° 17′ West 48.6 feet, to a point on the said southerly right of way line, which is 200.0 feet at right angles southwesterly from center line of track at Engineer Station 1023 plus 66.75; thence leaving right of way, but re-entering it at a point on the said southerly right of way line, which is 200.0 feet at right angles southerly from center line of track at Engineer Station 1093 plus 54.2; thence continuing inside the said right of way North 25° 53′ East 109.8 feet; thence North 82° 28′ East 143.8 feet; thence South 75° 33′ East 347.85 feet; thence South 69° 26′ East 237.0 feet; thence South 59° 55′ East 235.3 feet; thence

South 56° 03′ East 162.25 feet; thence South 49° 16′ East 363.3 feet; thence South 44° 40′ East 1211.55 feet; thence South 51° 43′ East 226.25 feet; thence South 67° 32′ East 192.36 feet; thence South 76° 03′ East 437.1 feet to a point [fol. 9] on the east line of Section 12, Township 4 South, Range 1 West, said point being North 761.5 feet from the southeast corner of said section 12; thence continuing on the same course 366.9 feet; thence South 84° 07′ East 261.5 feet; thence North 79° 03′ East 203.2 feet; thence North 69° 40′ East 652.0 feet; thence North 66° 28′ East 1013.6 feet; thence North 75° 17′ East 226.4 feet; thence North 87° 26′ East 297.5 feet; thence South 84° 48′ East 209.4 feet; thence South 79° 23′ East 323.2 feet; thence North 51° 26′ East 137.6 feet; thence South 69° 36′ East 733.55 feet; thence South 73° 21′ East 389.1 feet; thence South 81° 08′ East 340.77 feet; thence South 83° 32′ 30″ East 294.0 feet to a point on the east line of Section 7, Township 4 South, Range 1 East, and distant 941.4 feet North and 5195.5 feet East of the said southeast corner of Section 12, Township 4 South, Range 1 West, said point being also North 70.0 feet from Engineer Station 1184 plus 21.2 of the said Central Pacific Railway.

The above described land is a part of the right of way granted by the United States of America by the Acts of Congress approved July 1, 1862 and July 2, 1864 to Central Pacific Railroad Company of California, the predecessor in interest of the plaintiff, Central Pacific Railway Company.

[fol. 10]

V

By virtue of the lease from Central Pacific Railroad Company (predecessor in interest of Central Pacific Railway Company) to plaintiff, Southern Pacific Company, dated February 17, 1885, and by virtue of the lease from Central Pacific Railway Company to Southern Pacific Company dated March 3, 1923, Southern Pacific Company is and at all the times herein mentioned was entitled to the possession of said land described in paragraph IV hereof.

VI

The defendants claim some estate or interest in said parcel of land above particularly described adverse to

plaintiffs, but such claim of defendants is without any right whatever, and the said defendants have not, and any of them has not, any estate, right, title or interest whatsoever in or to the above described land or to any part thereof.

VII

The defendant, the County of Alameda, through the people and the inhabitants thereof, and the other defendants hereinabove named, without the permission or consent and against the will of the plaintiffs and of each of them and without any right or legal authority whatsoever, are now using and at divers times since the 26th day of May, [fol. 11] 1920, said County and its Board of Supervisors and the defendants sued herein by the fictitious names of John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow, have been using the above described land for highway or road purposes and have been trespassing upon said land—all, as plaintiffs are informed and believe and so allege, with the knowledge and by authority of the Board of Supervisors of said County, and they have thereby wrongfully excluded the plaintiffs and each of them from possession of said land and all thereof, and have deprived the plaintiffs and each of them of the possession or beneficial enjoyment of said land, and unless they are restrained by order of this Court from so dong, the defendants in this suit will continue to trespass upon said land and to wrongfully continue in the possession of the same and to exclude the plaintiffs and each of them from the possession or beneficial enjoyment thereof, and will proceed to, and ultimately will, acquire by adverse user a right or interest or permanent easement therein for highway or road purposes.

VIII

That the true names of the defendants sued herein by the names of John Doe Corporation, Richard Roe Corporation, [fol. 12] John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow are unknown to plaintiffs and for that reason said defendants are sued herein by the fictitious names aforesaid and plaintiffs

pray that when the true names of said defendants are ascertained they may be inserted herein in lieu of said fictitious names and that this complaint be amended accordingly.

Wherefore, plaintiffs being without any plain, speedy or adequate remedy at law, and without relief save in a court of equity where such matters are properly cognizable, pray:

(1st) That defendants and each of them be required to set forth the nature of their and of each of their adverse claims to the above described land and that all adverse claims of said defendants and of each of them may be determined by decree of this Court.

(2nd) That by said decree it be adjudged and determined that none of said defendants has any estate or interest whatsoever in or to said land hereinabove described in paragraph IV hereof, and that the plaintiff, Central Pacific Railway Company, has a good and valid title in fee simple to the whole thereof and that the plaintiff, Southern Pacific Company, as the lessee of said land from Central Pacific Railway Company, is entitled to the possession of said land and of all thereof.

[fol. 13] (3rd) That the defendants and all persons claiming through or under them or any of them be forever debarred and enjoined from asserting any claim whatever in or to said land or in or to any part thereof adverse to plaintiffs.

(4th) That the defendants and all persons claiming by, through or under them or either of them be hereafter restrained from using said land for any purpose or from entering upon said land or in any way interfering with the title or possession of plaintiffs or of either of them in or to said land and that the plaintiffs be restored to the possession of all of said land.

(5th) That plaintiffs have such other and further relief as to the Court may seem just and equitable, with costs of suit.

W. M. Singer, Frank C. Cleary, and Frank Thunen,
Attorneys for Plaintiffs.

Duly verified.

[File endorsement omitted.]

[fol. 14] IN SUPERIOR COURT OF ALAMEDA COUNTY

ANSWER AND CROSS-COMPLAINT—Filed Jan. 5, 1926

Come now the above named defendants, County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Members of the Board of Supervisors of the said County, answering the complaint of plaintiffs on file herein, admit, deny and allege as follows:

I

The said defendants and each of them have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph I of the said complaint of plaintiffs, and basing their denial on this ground deny the said allegation contained in paragraph I of said complaint.

II

The said defendants and each of them have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph II of said complaint of plaintiffs, and basing their denial on this ground deny the allegation contained in said paragraph II of said complaint.

[fol. 15]

III

Admit that the allegations contained in paragraph III of said complaint of plaintiffs on file herein are true.

IV

Deny that the plaintiff, Central Pacific Railway Company, is the owner of the following described land or any part thereof, situate in the County of Alameda, State of California, to-wit,

A strip of land 6 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the line dividing San Joaquin and Alameda Counties, distant thereon North 63.1 feet from Engineer Station 414 plus 70.2 of the Central Pacific Rail-

way Company's main line from Oakland to Tracy, and which point is East 328.5 feet and North 2550.9 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 66 degrees 47′ West, 315.9 feet; South 25 degrees 41′ West, 88.1 feet; South 68 degrees 55′ West, 49.6 feet, North 79 degrees 02′ West, 259.2 feet; and South 89 degrees 23′ West to a point on the southerly right of way line of the said Central Pacific Railway Company, which bears South [fol. 16] 28 degrees 03-½′ West, a distance of 200.0 feet at right angles from Engineer Station 405 plus 92.4.

A strip of land 40 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the County Road leading from Sunol to Stockton by way of Patterson Pass which bears South 20 degrees 0′ West, 85.5 feet at right angles from Engineer Station 408 plus 31.7 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, said point of commencement being also North 2627.5 feet and West 300.75 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 64 degrees 27′ West, 203.6 feet; North 58 degrees 08′ West, 153.1 feet; North 56 degrees 36′ West, 150.6 feet; North 41 degrees 44′ West, 289.5 feet; North 31 degrees 19′ West, 193.3 feet; North 19 degrees 19′ West, 295.7 feet; North 6 degrees 31′ West, 283.2 feet; North 1 degree 18′ East, 351.4 feet; and North 23 degrees 47′ West, 402.62 feet to a point on the southerly right of way line of the said Central Pacific Railway Company, which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 386 plus 53.6; thence continuing on the same course North 23 degrees 47′ West [fol. 17] outside the right of way of the said Central Pacific Railway Company, 470.41 feet to a point on the said southerly right of way line which bears South 59 degrees 11-¾′ West, a distance of 200.0 feet at right angles from Engineer Station 381 plus 17.3; thence continuing on the same course North 23 degrees 47′ West inside the said right of way 722.07 feet; North 35 degrees 22′ West, 284.3 feet; North 49 degrees 32′ West, 289.6 feet to a point on the said southerly right of way line which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 368 plus 13.1; thence continuing on the same course

North 49 degrees 32′ West outside the said right of way 565.0 feet and North 24 degrees 30′ West, 92.6 feet to a point on the said southerly right of way line which bears South 33 degrees 55-¾′ West, a distance of 200.0 feet at right angles from Engineer Station 360 plus 81.8; thence continuing on the same course inside the right of way line North 24 degrees 30′ West, 71.6 feet; North 3 degrees 04′ East, 177.8 feet; North 20 degrees 24′ East, 41.9 feet, and North 37 degrees 31′ East, 163.2 feet to a point on the northerly right of way line of the said Central Pacific Railway Company, said point being North 1592.7 feet and East 63.9 feet of the corner common to Sections 29, 30, 31 and 32, Township 2 South, Range 4 East, M. D. B. & M., [fol. 18] and 200.0 feet at right angles northeasterly from Engineer Station 359 plus 45.2.

A strip of land twelve (12) feet in width being six (6) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point on the center line of County Road #4974 which bears North 10° 35′ West a distance of 59.9 feet northerly at right angles to center line or track from Engineer Station 996 plus 70.0 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, and which point is 9325.4 feet West and 2174.0 feet North of the southeast corner of Section 12, Township 4 South (Range 1 West, M. D. B. & M.; thence South 86° 29′ East 113.6 feet; thence North 52° 30′ East 82.3 feet; thence North 0° 31′ West 73.7 feet; thence North 38° 11′ West 57.8 feet to a point on the northerly right of way line of the said Central Pacific Railway, said point being 200.0 feet at right angles northerly from central line of track at Engineer Station 998 plus 15.8.

A strip of land twenty (20) feet in width being ten (10) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point which bears North 10° 35′ West a distance of 200.0 feet at right angles from center line of track at Engineer Station 993 plus 02.5 of the Central Pacific Railway Company's main line leading from Oakland to [fol. 19] Tracy, said point also being 9712.5 feet West and 2244.2 feet North of the southeast corner of Section 12, Township 4 South Range 1 West, M. D. B. & M.; thence South 69° 41′ East 200.8 feet; thence South 89° 52′ East,

249.5 feet; thence South 39° 41′ East 105.0 feet; thence North 88° 03′ East 223.15 feet; thence South 71° 48′ East 176.15 feet; thence North 85° 18′ East 263.97 feet; thence North 59° 50′ East 221.95 feet; thence South 77° 22′ East 159.52 feet; thence North 58° 08′ East 161.87 feet to a point on the southerly right of way line of the said Central Pacific Railway, which is 200.0 feet at right angles southeasterly from center line of track at Engineer Station 1008 plus 52.4; thence leaving the right of way but re-entering at a point on the said southerly right of way line which is 200.0 feet at right angles southwesterly from center line of track at Engineer Station 1018 plus 72.3; thence inside the said right of way North 69° 10′ East 204.0 feet; thence South 62° 19′ East 138.5 feet; thence South 13° 19′ East 124.2 feet; thence South 5° 17′ West 48.6 feet, to a point on the said southerly right of way line, which is 200.0 feet at right angles southwesterly from center line of track at Engineer Station 1023 plus 66.75; thence leaving right of way, but re-entering it at a point on the said southerly right of way line, which is 200.0 feet [fol. 20] at right angles southerly from center line of track at Engineer Station 1093 plus 54.2; thence continuing inside the said right of way North 25° 53′ East 109.8 feet; thence North 82° 28′ East 143.8 feet; thence South 75° 33′ East 347.85 feet; thence South 69° 26′ East 237.0 feet; thence South 59° 55′ East 235.3 feet; thence South 56° 03′ East 162.25 feet; thence South 49° 16′ East 363.3 feet; thence South 44° 40′ East 1211.55 feet; thence South 51° 43′ East 226.25 feet; thence South 67° 32′ East 192.36 feet; thence South 76° 03′ East 437.1 feet to a point on the east line of Section 12, Township 4 South (Range 1 West, said point being North 761.5 feet from the southeast corner of said Section 12; thence continuing on the same course 366.9 feet; thence South 84° 07′ East 261.5 feet; thence North 79° 03′ East 203.2 feet; thence North 69° 40′ East 652.0 feet; thence North 66° 28′ East 1013.6 feet; thence North 75° 17′ East 226.4 feet; thence North 87° 26′ East 297.5 feet; thence South 84° 48′ East 209.4 feet; thence South 79° 23′ East 323.2 feet; thence North 51° 26′ East 137.6 feet; thence South 69° 36′ East 733.55 feet; thence South 73° 21′ East 389.1 feet; thence South 81° 08′ East 340.77 feet; thence South 83° 32′ 30″ East 294.0 feet to a point on the east line of Section

7, Township 4 South, Range 1 East, and distant 941.4 feet [fol. 21] North and 5195.5 feet East of the said southeast corner of Section 12 Township 4 South, Range 1 West, said point being also North 70.0 feet from Engineer Station 1184 plus 21.2 of the said Central Pacific Railway. and in this connection allege that the defendant, County of Alameda is now and at all times mentioned in said complaint of plaintiffs was the owner of the said above described land and every part thereof.

V

The said defendants and each of them have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph IV of said complaint that the Central Pacific Railroad Company of California is the predecessor in interest of the plaintiff, Central Pacific Railway Company, and basing their denial on this ground deny the said allegation.

VI

Deny that the above described land or any part thereof is a part of the right of way granted by the United States of America by acts of Congress approved July 1, 1862 and July 2, 1864, or either of said acts or any other act or acts of Congress, to Central Pacific Railroad Company of California, the alleged predecessor in interest of the plaintiff, Central Pacific Railway Company.

[fol. 22]

VII

The said defendants and each of them have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph V of said complaint that Central Pacific Railroad Company, alleged predecessor in interest of Central Pacific Railway Company, executed a lease to plaintiff, Southern Pacific Company, dated February 17, 1885, and basing their denial on this ground deny the said allegation.

VIII

The said defendants and each of them have no information or belief upon the subject sufficient to enable them

to answer the allegation contained in paragraph V of said complaint that Central Pacific Railway Company executed a lease to Southern Pacific Company, dated March 3, 1923, and basing their denial on this ground deny the said allegation.

IX

Deny that by virtue of the alleged lease from Central Pacific Railroad Company, alleged predecessor in interest of Central Pacific Railway Company, to plaintiff, Southern Pacific Company, dated February 17, 1885, and by virtue of the alleged lease from Central Pacific Railway Company to Southern Pacific Company, dated March 3, [fol. 23] 1923, or by virtue of either of the alleged leases or any lease or leases, Southern Pacific Company is and at all times mentioned in said complaint of plaintiffs on file herein was entitled to the possession of the above described land or any part thereof, and in this connection allege that the defendant, County of Alameda, is and at all times mentioned in said complaint of plaintiffs on file herein was entitled to the possession of the land above described and every part thereof.

X

Deny that Southern Pacific Company is and at all times mentioned in said complaint of plaintiffs on file herein was entitled to the possession of the land above described or any portion thereof, and in this connection allege that the defendant, County of Alameda, is and at all times mentioned in said complaint of plaintiffs on file herein was entitled to the possession of the land above described and every part thereof.

XI

Admit that defendants claim some estate or interest in said parcel of land above particularly described adverse to plaintiffs, and deny that such claim of defendants is without any right whatever, and deny that said defendants and any of them have not any right, title or interest whatsoever in or to the above described land or to any [fol. 24] part thereof, and in this connection allege that the defendant, County of Alameda, is and at all times men-

tioned in the complaint of plaintiffs on file herein was the owner in fee simple of the said land above described and every part thereof.

XII

Admit that the defendant, County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named, without the permission or consent and against the will of the plaintiffs and each of them are now using, and at divers times since the 26th day of May, 1920, have been using the above described land and every part thereof for highway or road purposes.

XIII

Deny that the defendant, County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named or any of them are now using, and at divers times since the 26th day of May, 1920 have been using the above described land and every part thereof for highway or road purposes without any right or legal authority whatsoever, and in this connection allege that the defendant, County of Alameda, is and was at all times mentioned in complaint of plaintiffs on file herein the owner of the said above described land and every part thereof.

[fol. 25]

XIV

Deny that the said defendant, County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named or any of them have been trespassing upon the said land and every part thereof, and in this connection allege that the said defendant, County of Alameda, is the owner of the said land above described and every part thereof.

XV

Admit that the defendant, the County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named are now using and at divers times since the 26th day of May, 1920, have been using the above described land and every part thereof

for highway or road purposes with the knowledge and by the authority of the Board of Supervisors of said County.

XVI

Deny that the defendants and each or any of them have in any manner wrongfully excluded the plaintiffs or any of them from possession of said land and all thereof, and in this connection allege that the defendant, County of Alameda, is entitled to the possession of the land above described and every part thereof.

[fol. 26]

XVII

Deny that the said defendants and each or any of them have deprived the plaintiffs and each of them of the possession and beneficial enjoyment of said land and in this connection allege that the said County of Alameda is entitled to the beneficial enjoyment of the land above described and every part thereof.

Wherefore defendants and each of them pray judgment as hereinafter stated;

Second Defense

And for a second further and separate defense and answer to plaintiffs' complaint on file herein, defendants and each of them admit, deny and allege as follows:

I

Defendants refer specifically to the allegations, admissions and denials and each of them contained in paragraphs I, II, III, V, VI, VII, VIII, IX, X, XII, XV, XVI, and XVII of this answer as hereinabove set forth, and incorporate said allegations, admissions and denials and each of them into this second defense by reference to all intents and for all purposes as if fully set forth herein.

[fol. 27]

II

Deny that plaintiff, Central Pacific Railway Company, is the owner of the property hereinabove described in paragraph IV of this answer or any part thereof, and in

this connection allege that the defendant, County of Alameda, is, and at all times mentioned in complaint of plaintiffs on file herein was the owner of an easement and right of way for road and highway purposes in, along and upon said land and every part thereof.

III

Admit that defendants claim some estate or interest in said parcel of land above particularly described adverse to plaintiffs, and deny that said claim of defendants is without any right whatever, and deny that said defendants and any of them have not any right, title or interest whatsoever in or to the above described land or to any part thereof, and in this connection allege that the defendant, County of Alameda, is, and at all times mentioned in the complaint of plaintiffs on file herein was the owner of an easement and right of way for road and highway purposes in, along and upon said land and every part thereof.

IV

Deny that the defendant, County of Alameda, through [fol. 28] the people and the inhabitants thereof and the other defendants hereinabove named or any of them are now using and at divers times since the 26th day of May, 1920 have been using the above described land and every part thereof for highway or road purposes without any right, or legal authority whatsoever, and in this connection allege that the defendant, County of Alameda, is and was at all times mentioned in complaint of plaintiffs on file herein the owner of an easement and right of way for road purposes in, along and upon said land and every part thereof.

V

Deny that said defendant, County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named or any of them have been trespassing upon said land and every part thereof, and in this connection allege that the defendant, County of Alameda, is the owner of an easement and right of way for road and highway purposes in, along and upon said land and every part thereof.

Wherefore defendants and each of them pray judgment as hereinafter stated;

Third Defense

And for a third further and separate defense and answer [fol. 29] to plaintiffs' complaint on file herein, defendants and each of them admit, deny and allege as follows:

I

Defendants refer specifically to the allegations, admissions and denials and each of them contained in paragraphs IX and X of this answer as hereinabove set forth, and incorporate said allegations, admissions and denials and each of them into this third defense by reference to all intents and for all purposes as if fully set forth herein.

II

Defendants refer specifically to the denials and each of them contained in paragraphs XIII, XIV and XVI of this answer as hereinabove set forth, and incorporate said denials and each of them into this third defense by reference and to all intents and purposes as if fully set forth herein, and allege in this connection that the said land hereinabove described is and for many years last past has been in use as a wagon and other public highway and highways, and in this connection further allege that such road and highway and roads and highways are necessary for the public accommodation.

[fol. 30] Wherefore defendants and each of them pray judgment as hereinafter stated;

Fourth Defense.

And for a fourth further and separate defense and answer to plaintiffs' complaint on file herein, defendants and each of them allege as follows:

I

Allege that the defendant, County of Alameda and the other defendants named in the complaint of plaintiffs on

file herein and the inhabitants of the said County of Alameda and each of them are now and have been for a long time past, to-wit, during the past twelve years and for many years prior thereto, in continuous, open and exclusive possession and occupation of the said land described in paragraph IV of plaintiffs' complaint on file herein and every part thereof for and as a public road and highway and public roads and highways and said defendants further allege that the defendant, County of Alameda, has expended great sums of money for the establishment, operation and maintenance of said road and highway and roads and highways over said land and every part thereof, which said expenditures by said County of Alameda have extended over a long period of years as aforesaid, and [fol. 31] said defendants further allege that all of the acts and things above mentioned in this fourth defense were and are done and continued with the full knowledge of and without any objection by or on behalf of the plaintiffs herein.

Wherefore defendants and each of them pray judgment as hereinafter stated;

Counter-Claim

And further answering the complaint of plaintiffs on file herein, said defendants, County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, members of the Board of Supervisors of the said County and each of them, cross-complain of the plaintiffs above named and each of them, and for cause of action against the said plaintiffs, allege as follows, to-wit:

I

The plaintiff, Central Pacific Railway Company, is and at all times mentioned herein, was a corporation duly organized and existing under and by virtue of law.

II

The plaintiff, Southern Pacific Company, is and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of law.

[fol. 32]

III

The defendant, the County of Alameda, is and at all times herein mentioned was, a body politic and corporate, duly organized and existing under and by virtue of the laws of the State of California, and Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, are the duly qualified and acting members of the Board of Supervisors of said County of Alameda.

IV

The defendant, the County of Alameda, is the owner in fee of that certain real property and every part thereof, situate in the County of Alameda, State of California, and more particularly described in paragraph IV, on page 2 of the within Answer, which said description contained in said paragraph IV, is specifically referred to and made a part hereof to all intents and for all purposes as if specifically set forth herein.

V

The said defendant, County of Alameda, is in the possession and entitled to the possession of the said land and every part thereof, hereinabove referred to and more particularly described in said paragraph IV on page 2 of the within Answer.

[fol. 33]

VI

The said plaintiffs and each of them claim some estate or interest in said real property hereinabove referred to and particularly described, adverse to defendants, but such claim of plaintiffs is without any right whatever and the said plaintiffs have not and either of them has not any estate, right, title or interest whatsoever in or to the said land hereinabove referred to and particularly described or to any part thereof.

Wherefore defendants being without any plain, speedy or adequate remedy at law and without relief, save in a court of equity, in which such matters are properly cognizable, pray:

1. That plaintiffs and each of them be required to set forth the nature of their and each of their adverse claims to the above described land and that all adverse claims of said plaintiffs and each of them may be determined by decree of this court.

2. That by said decree, it be adjudged and determined that the defendant, County of Alameda, is the owner in fee and entitled to the possession of the land and every part thereof, hereinbefore described in said paragraph IV on page 2 of the within Answer.

3. That the plaintiffs and each of them and all persons [fol. 34] claiming through or under them or either of them, be forever debarred and enjoined from asserting any claim or title whatever in or to said land or in or to any part thereof adverse to defendants; that defendants have such other and further relief as to the court may seem just and equitable.

Earl Warren, District Attorney in and for the County of Alameda, State of California; Ralph E. Hoyt, Assistant District Attorney in and for the County of Alameda, State of California; J. Paul St. Sure, Deputy District Attorney in and for the County of Alameda, State of California, Attorneys for Defendants, County of Alameda, Chas. W. Heyer, Ralph Richmond, John T. Mullins, Redmond C. Staats, and William J. Hamilton, Members of the Board of Supervisors of said County.

Duly verified.

[File endorsement omitted.]

[fol. 35] In Superior Court of Alameda County

Answer of Central Pacific Railway Company and Southern Pacific Company to Cross-complaint—Filed March 12, 1926

Cross-defendants Central Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, answering the cross-complaint (entitled counter-

claim) of the cross-complainants County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, members of the Board of Supervisors of the said County:

I

Admit subdivisions I, II, and III of said cross-complaint.

II

Deny that the cross-complainant County of Alameda, or any of the cross-complainants, is the owner in fee or otherwise of any part whatsoever of that certain real property situated in the County of Alameda, State of California, and particularly described in paragraph IV, pages 2, 3, 4, and 5, of the answer and cross-complaint of the cross-complainants herein.

[fol. 36]

III

Deny that cross-complainant County of Alameda or any of the cross-complainants, is entitled to the possession of any part of the said land particularly described and last hereinabove referred to.

IV

Admit that these cross-defendants, and each of them, claims some estate and interest in the said real property described as aforesaid, which claim is adverse to the cross-complainants and all thereof, but these cross-defendants deny that such claims of these cross-defendants are without right and deny that these cross-defendants have not or that either of them has not any estate, right, title or interest whatsoever in or to the said land hereinabove and in said cross-complaint referred to and particularly described in paragraph IV of the answer of cross-complainants herein; and in this behalf these cross-defendants aver that Central Pacific Railway Company is the owner in fee, and entitled to the exclusive possession by and through its lessee and co-cross defendant Southern Pacific Company to the whole of said parcels of land particularly described in said paragraph IV of the answer of cross-

complainants herein, and referred to in said cross-complaint.

[fol. 37] Wherefore these cross-defendants pray that cross-complainants take nothing by their said cross-complaint and that cross-defendants have judgment against the cross-complainants as prayed in the complaint herein filed by these cross-defendants May 23, 1925.

W. M. Singer, Frank C. Cleary, and Frank Thunen,
Attorneys for said Cross-defendants.

Duly verified.

[File endorsement omitted.]

IN SUPERIOR COURT OF ALAMEDA COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Aug. 5, 1927.

This cause came on regularly for trial on October 11, 1926, before the court in Department No. 6, Honorable Eugene F. McDaniel, Judge presiding, without a jury, a jury trial having been waived by the respective parties. Plaintiffs appeared by their counsel, Frank Thunen, and the defendants County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Mem-[fol. 38] bers of the Board of Supervisors of the said County, appeared by their counsel Earl Warren, District Attorney, Ralph E. Hoyt, Assistant District Attorney and J. Paul St. Sure, Chief Deputy District Attorney; and the action was dismissed as to the fictitiously designated defendants John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow. Said trial proceeded from day to day, evidence both oral and documentary being taken. Thereafter said cause was duly argued by counsel for the respective parties and submitted to the court for decision upon briefs thereafter to be filed. Now, the said briefs being in, and the case finally submitted, and the court being fully advised in the premises, makes and files its findings of fact as follows, to wit:

I

That plaintiff Central Pacific Railway Company is the owner in fee of a strip of land 400 feet in width, lying equally 200 feet on each side of the center line of main track of railroad in the County of Alameda and embracing within the outer boundaries of the said railroad right of way the following particularly described strips of land.

[fol. 39] Parcel "A."—A strip of land 66 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the line dividing San Joaquin and Alameda Counties, distant thereon North 63.1 feet from Engineer Station 414 plus 70.2 of the Central Pacific Railway Company's main line from Oakland to Tracy, and which point is East 328.5 feet and North 2550.9 feet from the one-quarter section corner on the North line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 66 degrees 47′ West, 315.9 feet; South 25 degrees 41′ West, 88.1 feet; South 68 degrees 55′ West, 49.6 feet; North 79 degrees 02′ West, 259.2 feet; and South 89 degrees 23′ West to a point on the southerly right of way line of the said Central Pacific Railway Company, which bears South 28 degrees 03½′ West, a distance of 200.0 feet at right angles from Engineer Station 405 plus 92.4.

Parcel "B."—A strip of land 40 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the County Road leading from Sunol to Stockton by way of Patterson Pass which bears South 20 degrees 0′ West, 85.5 feet at right angles from Engineer Station 408 plus 31.7 of the Central Pacific Rail-

[fol. 40] way Company's main line leading from Oakland to Tracy, said point of commencement being also North 2627.5 feet and West 300.75 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 64 degrees 27′ West, 203.6 feet; North 58 degrees 08′ West, 153.1 feet; North 56 degrees 36′ West, 150.6 feet; North 41 degrees 44′ West, 289.5 feet; North 31 degrees 19′ West, 193.3 feet; North 19 degrees 19′ West, 295.7 feet; North 6 degrees 31′ West, 283.2 feet; North 1 degree 18′ East, 351.4 feet; and North 23 degrees 47′ West, 402.62 feet to a point on the southerly right of way line of the said Central Pacific Rail-

way Company, which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 386 plus 53.6; thence continuing on the same course North 23 degrees 47′ West outside the right of way of the said Central Pacific Railway Company, 470.41 feet to a point on the said southerly right of way line which bears South 59 degrees 11¾′ West, a distance of 200.0 feet at right angles from Engineer Station 381 plus 17.3; thence continuing on the same course North 23 degrees 47′ West inside the said right of way 722.07 feet; North 35 degrees 22′ West, 284.3 feet; North 49 degrees 32′ West, 289.6 feet to a point on the said southerly right of way line which is distant 200.0 feet [fol. 41] measured at right angles southwesterly from Engineer Station 368 plus 13.1; thence continuing on the same course North 49 degrees 32′ West outside the said right of way 565.0 feet and North 24 degrees 30′ West, 92.6 feet to a point on the said southerly right of way line which bears South 33 degrees 55¾′ West, a distance of 200.0 feet at right angles from Engineer Station 360 plus 81.8; thence continuing on the same course inside the right of way line North 24 degrees 30′ West, 71.6 feet; North 3 degrees 04′ East, 177.8 feet; North 20 degrees 24′ East, 41.9 feet, and North 37 degrees 31′ East, 163.2 feet to a point on the northerly right of way line of the said Central Pacific Railway Company, said point being North 1592.7 feet and East 63.9 feet of the corner common to Sections 29, 30, 31 and 32, Township 2 South, Range 4 East, M. D. B. & M.; and 200.0 feet at right angles northeasterly from Engineer Station 359 plus 45.2.

Parcel "C."—A strip of land twelve (12) feet in width being six (6) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point on the center line of County Road No. 4974 which bears North 10° 35′ West a distance of 59.9 feet northerly at right angles to center line of track from Engineer Station 996 plus 70.0 of the Central Pacific Rail- [fol. 42] way Company's main line leading from Oakland to Tracy, and which point is 9325.4 feet West and 2174.0 feet North of the southeast corner of Section 12, Township 4 South, Range 1 West, M. D. B. & M.; thence South 86° 29′ East 113.6 feet; thence North 52° 30′ East 82.3 feet; thence North 0° 31′ West 73.7 feet; thence North 38° 11′ West 57.8 feet to a point on the northerly right of way line

of the said Central Pacific Railway, said point being 200.0 feet at right angles northerly from center line of track at Engineer Station 998 plus 15.8.

Parcel "D."—Commencing at the southeast corner of Section 12 T. 4 S., R. 1 W., M. D. B. & M.; thence north 76° 57′ 15″ West 9967.59 feet to a point, which bears north 10° 39′ 30″ West distant 200 feet from Engineer Station 992 plus 95.0 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the northerly right-of-way line of the said railway, as said right-of-way line was established by that certain map entitled "Map of The Western Pacific Railroad" and filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence south 69° 41′ East, 201.10 feet, South 89° 52′ East, 249.5 feet, South 39° 41′ East, 105.0 feet, north 88° 03′ East, 223.15 [fol. 43] feet, South 71° 48′ East, 176.15 feet, North 85° 18′ East, 263.97 feet, North 59° 50′ East, 221.95 feet, South 77° 22′ East, 159.52 feet, and North 58° 08′ East 95.87 feet to a point on the southerly right-of-way line of the said Central Pacific Railway, which bears South 39° 15′ 30″ East distant 200 feet on a radial line from Engineer Station 1007 plus 76.67 of the said original constructed line.

Parcel "E."—Commencing at the Southeast corner of Section 12, T. 4 S., R. 1 W., M. D. B. & M.; thence North 70° 38′ 04″ West 7776.4 feet to a point, which bears South 9° 30′ 30″ West distant 200 feet from Engineer Station 1018 plus 64.1 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the southerly right-of-way line of the said railway, as said right-of-way line was established by that certain map, entitled "Map of The Western Pacific Railroad" filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence North 69° 10′ East, 207.06 feet; South 62° 19′ East, 138.5 feet; South 13° 19′ East, 124.2 feet, and South 5° 17′ West, 51.42 feet to a point on the said southerly right-of-way line of the said Central Pacific Railway, which bears South 41° 36′ 55″ [fol. 44] West distant 200 feet on a radial line from Engineer Station 1023 plus 58.05 of the said original constructed line.

Parcel "F."—Commencing at the southeast corner of Section 12, T. 4 S., R. 1 W., M. D. B. & M.; thence North 50° 32′ 04″ West 3861.26 feet to a point, which bears South 2° 39′ West 200 feet distant from Engineer Station 1093 plus 40.94 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the southerly right-of-way line of the said railway as said right-of-way line was established by that certain map entitled "Map of The Western Pacific Railroad" filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence North 26° 05′ East, 105.36 feet; North 82° 40′ East, 143.8 feet; South 75° 21′ East, 347.85 feet; South 69° 14′ East, 237.0 feet; South 59° 43′ East, 235.3 feet; South 55° 51′ East, 162.25 feet; South 49° 04′ East, 363.3 feet; South 44° 29′ East, 1211.55 feet; South 51° 32′ East, 226.25 feet; South 67° 21′ East, 192.36 feet; South 75° 52′ East, 804.0 feet; South 83° 55′ East, 261.5 feet; North 79° 14′ East, 203.2 feet; North 69° 51′ East, 652.0 feet; North 66° 40′ East, 1013.6 feet; North 75° 28′ East, 226.4 feet; North 87° 36′ East, 297.5 [fol. 45] feet; South 84° 38′ East, 209.4 feet; South 79° 13′ East, 323.2 feet; North 51° 36′ 30″ East, 137.6 feet; South 69° 23′ 30″ East, 733.55 feet; South 73° 08′ 30″ East, 389.1 feet; South 80° 55′ 30″ East, 340.77 feet, and South 83° 19′ 30″ East, 294.00 feet, more or less, to a point on the east line of Section 7, Township 4 South, Range 1 East, Mt. Diablo Base and Meridian, which bears North 70.49 feet from Engineer Station 1183 plus 47.50 of the said original constructed line.

II

That the aforementioned railroad right of way, embracing the foregoing particularly described parcels of land is a part of the right of way granted to Central Pacific Railroad Company of California by Act of Congress approved July 1, 1862, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for postal, military and other purposes." (12 Stat. 489) That plaintiff Central Pacific Railway Company is successor in title to Central Pacific Railroad Company of California

by successive corporate consolidations and by mesne conveyance.

[fol. 46] III

That the land within said 400 foot railroad right of way above mentioned, and embracing the strips of land hereinabove particularly described, was on July 1st, 1862, all unappropriated public land of the United States; and that said railroad contemplated by the said Act of Congress of July 1st, 1862, was definitely located and constructed by Central Pacific Railroad Company of California, and its successors within the time and in the manner prescribed by said act, with the center line of main track coincident with the center line of the 400 foot right of way above mentioned; and said railroad was duly accepted by the President of the United States on behalf of the Government; that said railroad was constructed as to the right of way herein mentioned in the years 1867 and 1868, and ever since said time said railroad has been in constant operation by plaintiffs and their predecessors as a common carrier of freight and passengers in a regular interstate and intrastate transportation business upon the line of its original construction; that from and since the year 1885 said railroad has been so operated by plaintiff Southern Pacific Company under lease from plaintiff Central Pacific Railway Company, and its predecessors and is now so operated by plaintiff Southern Pacific Company.

[fol. 47] IV

That roads for vehicular traffic claimed as public ways by the defendant County of Alameda embrace the area described hereinabove as parcels A, B, C, D, E and F.

Parcel A is a road beginning at the inter-county line between the Counties of Alameda and San Joaquin, and within the boundaries of the railroad right of way of plaintiff Central Pacific Railway Company, aforesaid, and extending westerly through the town of Midway, a station on said railroad line, 1000 feet more or less to a point of intersection with the southerly boundary line of the aforesaid railroad right of way.

Parcel B is a road extending from the aforesaid town of Midway westerly within the boundaries of the aforesaid

railroad right of way to a point of exit therefrom and intersection of the northerly line thereof, a distance of one mile, more or less.

Parcel C is a branch road extending from the intersection with Parcel D at a point near the center line of the aforesaid railroad right of way at Farwell, a station on said railroad line, and extending northerly a distance of 200 feet, more or less, to a point of intersection with the northerly boundary line of said railroad right of way.

[fol. 48] As to Parcels A. B, and C, the court finds that the defendant County of Alameda is not now, and never has been, the owner of any part of either Parcel A, B or C, above described, or of any interest therein or easement thereover, and that none of the said roads defined as parcels A, B, and C, is necessary for the public accommodation, and that the defendant County of Alameda has not expended great sums of money, or anything more than nominal amounts for the establishment, operation or maintenance of any part of any of said roads designated as parcels A, B, and C.

V

Parcels D. E and F are portions of a continuous highway extending from a point of intersection with the northerly boundary line of the aforesaid railroad right of way opposite the crossing of said railroad with Alameda Creek, in Niles Canyon, at or near the aforesaid station of Farwell, and extending easterly along the general course of Alameda Creek through Niles Canyon, and in considerable part within the boundaries of the aforesaid railroad right of way, to a point near Sunol, a station on said railroad right of way, a distance of three miles, more or less. Between Parcel D and Parcel E and between Parcel E and Parcel F the [fol. 49] said highway lies outside of the railroad right of way aforesaid; that the highway hereinabove described in part as Parcels D, E and F has existed in the location described since the year 1911, with the exception of a line change made within one year preceding the commencement of this action at the crossing of Alameda Creek in the first and second courses of Parcel F, above described; that said road as it existed prior to said line change is known and identified as county road survey No. 4974; that said road has been in constant use for vehicular traffic by the public

continuously since the year 1911; that the said Niles Canyon through which said road No. 4974 extends is narrow and rugged; that in the year 1859 defendant Alameda County surveyed and laid out through the said Niles Canyon, under Survey No. 247, a county road which was in the same year declared by the Board of Supervisors of said county to be a public highway; that the said survey No. 247 extended from Vallejo's Mill, in the County of Alameda, a point two miles, more or less, westerly of the aforesaid station of Farwell; thence easterly by way of Farwell up Alameda Creek through Niles Canyon to a point at or near Sunol; that for more than sixty years there has existed with the knowledge of plaintiffs and their predecessors a highway for ordinary [fol. 50] vehicular travel through Niles Canyon; but the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that these parts of the old road No. 247 not expressly abandoned by the Board of Supervisors on said date and now included within the limits of County road No. 4974, are a part of the present traveled road; but that upon adoption of county road No. 4974 in 1911 the pre-existing road for a distance of one-half mile more or less between Parcel E and Parcel F and within the railroad right of way aforesaid was abandoned by defendant Alameda County; that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with county road No. 4974, adopted by the Board of Supervisors of the defendant County of Alameda March 27, 1911, or whether the highway actually traveled prior to 1911 followed the line of survey No. 247 for any distance whatever. That the topographical, geographical and other physical features and conditions existing in the disputed portions of the right of way through Niles Canyon, viz: the narrowness of the canyon, proximity of Alameda Creek which in the winter season becomes a torrential stream sometimes capable of destroying bridges and roadways, and the steep sides of the canyon make it practically necessary to main- [fol. 51] tain the highway through the disputed territory because of the overwhelming difficulties to substitute a different route in those places where the road is within the 200 foot limit from the center line of main track of railroad. That the defendant County of Alameda has expended for improvements and maintenance of the highway through

Niles Canyon, the right of way of which includes parcels "D," "E" and "F," a large sum of money since 1911, to-wit, more than One Hundred Thousand ($100,000.00) Dollars. That the said highway through Niles Canyon is necessary for public accommodation.

Conclusions

The court concludes from the foregoing findings that plaintiffs are entitled to judgment quieting the title of Central Pacific Railway Company in fee to each of the three several Parcels of land designated A, B, and C, in the complaint and hereinabove particularly described, awarding exclusive possession to plaintiffs as to each of said Parcels A, B, and C, and enjoining and restraining the defendants and those claiming under the defendants from claiming any right, title or interest in or to any part of either Parcel A, B, or C, adverse to the plaintiffs; that plaintiffs are entitled to judgment further declaring the paramount title in [fol. 52] fee of plaintiff Central Pacific Railway Company as to Parcels D, E, and F, subject to an easement in favor of the defendant County of Alameda by reason of necessity to maintain its present right of way for highway purposes as laid out under said survey 4974, subject, however, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States" (18 Stat. 482) declaring: "And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road."

Let judgment be entered accordingly.

Eugene P. McDaniel, Judge Presiding.

Dated Aug. 4, 1927.

[fol. 53] [File endorsement omitted.]

IN SUPERIOR COURT OF ALAMEDA COUNTY

— JUDGMENT—Filed Aug. 19, 1927

This cause came on regularly for trial on October 11, 1926, before the court in Department No. 6, Honorable Eugene P. McDaniel, Judge presiding, without a jury, a jury trial having been waived by the respective parties. Plaintiffs appeared by their counsel Frank Thunen, and the defendants County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Members of the Board of Supervisors of the said County, appeared by their counsel Earl Warren, District Attorney, Ralph E. Hoyt, Assistant District Attorney and J. Paul St. Sure, Chief Deputy District Attorney; and the action was dismissed as to the fictitiously designated defendants John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow. Said trial proceeded from day to day, evidence both oral and documentary being taken. Thereafter said cause was duly argued by counsel orally [fol. 54] and briefed on behalf of the respective parties and submitted to the court for decision; and the court having considered the evidence and the oral and written arguments and being fully advised in the premises made and filed its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith:

Now, therefore, it is hereby ordered, adjudged and decreed that plaintiff Central Pacific Railway Company, a corporation, is the owner in fee of a strip of land 400 feet in width, lying equally 200 feet on each side of the center line of its main track of railroad in the County of Alameda and embracing within the outer boundaries of the said railroad right of way the following particularly described strips of land:

Parcel "A."—A strip of land 66 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the line dividing San Joaquin and Alameda Counties, distant thereon North 63.1 feet from Engineer Station 414 plus 70.2 of the Central Pacific Railway Company's main line from Oakland to Tracy, and which point is East 328.5 feet and North 2550.9 feet from the one-

quarter section corner on the North line of Section 5, Township 3 South, Range 4 East, Mount Diablo Base and Meri- [fol. 55] dian; thence North 66 degrees 47′ West, 315.9 feet; South 25 degrees 41′ West, 88.1 feet; South 68 degrees 55′ West, 49.6 feet; North 79 degrees 02′ West, 259.2 feet; and South 89 degrees 23′ West to a point on the southerly right of way line of the said Central Pacific Railway Company, which bears South 28 degrees 03½′ West, a distance of 200.0 feet at right angles from Engineer Station 405 plus 92.4.

Parcel "B."—A strip of land 40 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the County Road leading from Sunol to Stockton by way of Patterson Pass which bears South 20 degrees 0′ West, 85.5 feet at right angles from Engineer Station 408 plus 31.7 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, said point of commencement being also North 2627.5 feet and West 300.75 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, Mount Diablo Base and Meridian; thence North 64 degrees 27′ West, 203.6 feet; North 58 degrees 08′ West, 153.1 feet; North 56 degrees 36′ West, 150.6 feet; North 41 degrees 44′ West, 289.5 feet; North 31 degrees 19′ West, 193.3 feet; North 19 degrees 19′ West, 295.7 feet; North 6 degrees 31′ [fol. 56] West, 283.2 feet; North 1 degree 18′ East, 351.4 feet; and North 23 degrees 47′ West, 402.62 feet to a point on the southerly right of way line of the said Central Pacific Railway Company, which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 386 plus 53.6; thence continuing on the same course North 23 degrees 47′ West outside the right of way of the said Central Pacific Railway Company, 470.41 feet to a point on the said southerly right of way line which bears South 59 degrees 11¾′ West, a distance of 200.0 feet at right angles from Engineer Station 381 plus 17.3; thence continuing on the same course North 23 degrees 47′ West inside the said right of way 722.07 feet; North 35 degrees 22′ West, 284.3 feet; North 49 degrees 32′ West, 289.6 feet to a point on the said southerly right of way line which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 368 plus 13.1; thence continuing on the same course North 49 degrees 32′ West outside the said right of way 565.0 feet and North 24 degrees 30′ West, 92.6 feet to a point on the

said southerly right of way line which bears South 33 degrees 55¾′ West, a distance of 200.0 feet at right angles from Engineer Station 360 plus 81.8; thence continuing on the same course inside the right of way line North 24 degrees 30′ West, 71.6 feet; North 3 degrees 04′ East, 177.8 [fol. 57] feet; North 20 degrees 24′ East, 41.9 feet, and North 37 degrees 31′ East, 163.2 feet to a point on the northerly right of way line of the said Central Pacific Railway Company, said point being North 1592.7 feet and East 63.9 feet of the corner common to Sections 29, 30, 31 and 32, Township 2 South, Range 4 East, Mount Diablo Base and Meridian; and 200.0 feet at right angles northeasterly from Engineer Station 359 plus 45.2.

Parcel "C".—A strip of land twelve (12) feet in width being six (6) feet on each side of a certain center line described as follows, to wit:

Commencing at a point on the center line of the County Road No. 4974 which bears North 10° 35′ West a distance of 59.9 feet northerly at right angles to center line of track from Engineer Station 996 plus 70.0 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, and which point is 9325.4 feet West and 2174.0 feet North of the southeast corner of Section 12, Township 4 South, Range 1 West, Mount Diablo Base and Meridian; thence South 86° 29′ East 113.6 feet; thence North 52° 30′ East 82.3 feet; thence North 0° 31′ West 73.7 feet; thence North 38° 11′ West 57.8 feet to a point on the northerly right of way line of the said Central Pacific Railway, said [fol. 58] point being 200.0 feet at right angles northerly from center line of track at Engineer Station 998 plus 15.8.

Parcel "D".—Commencing at the southeast corner of Section 12, Township 4 South, Range 1 West, Mount Diablo Base and Meridian; thence north 76° 57′ 15″ West 9967.59 feet to a point, which bears north 10° 39′ 30″ West distant 200 feet from Engineer Station 992 plus 95.0 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the northerly right of way line of the said railway, as said right of way line was established by that certain map entitled "Map of The Western Pacific Railroad" and filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento,

California, said point being the point of beginning of the road to be described; thence south 69° 41′ East, 201.10 feet, South 89° 52′ East, 249.5 feet, South 39° 41′ East, 105.0 feet, north 88° 03′ East, 223.15 feet, South 71° 48′ East, 176.15 feet, North 85° 18′ East, 263.97 feet, North 59° 50′ East, 221.95 feet, South 77° 22′ East, 159.52 feet, and North 58° 08′ East 95.87 feet to a point on the southerly right of way line of the said Central Pacific Railway, which bears South 39° 15′ 30″ East distant 200 feet on a radial line from [fol. 59] Engineer Station 1007 plus 76.67 of the said original constructed line.

Parcel "E".—Commencing at the Southeast corner of Section 12, T. 4 S., R. 1 W., Mount Diablo Base and Meridian; thence North 70° 38′ 04″ West 7776.4 feet to a point, which bears South 9° 30′ 30″ West distant 200 feet from Engineer Station 1018 plus 64.1 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the southerly right of way line of the said railway, as said right of way line was established by that certain map entitled "Map of The Western Pacific Railroad" filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence North 69° 10′ East, 207.06 feet; South 62° 19′ East, 138.5 feet; South 13° 19′ East, 124.2 feet, and South 5° 17′ West, 51.42 feet to a point on the said southerly right of way line of the said Central Pacific Railway, which bears South 41° 36′ 55″ West distant 200 feet on a radial line from Engineer Station 1023 plus 58.05 of the said original constructed line.

Parcel "F".—Commencing at the southeast corner of Section 12, T. 4 S., R. 1 W., Mount Diablo Base and Meridian; thence North 50° 32′ 04″ West 3861.26 feet to a [fol. 60] point, which bears South 2° 39′ West 200 feet distant from Engineer Station 1093 plus 40.94 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the southerly right of way line of the said railway as said right of way line was established by that certain map entitled "Map of The Western Pacific Railroad" filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence North 26° 05′ East, 105.36 feet;

North 82° 40′ East, 143.8 feet; South 75° 21′ East, 347.85 feet; South 69° 14′ East, 237.0 feet; South 59° 43′ East, 235.3 feet; South 55° 51′ East, 162.25 feet; South 49° 04′ East, 363.3 feet; South 44° 29′ East, 1211.55 feet; South 51° 32′ East, 226.25 feet; South 67° 21′ East, 192.36 feet; South 75° 52′ East, 804.0 feet; South 83° 55′ East, 261.5 feet; North 79° 14′ East, 203.2 feet; North 69° 51′ East, 652.0 feet; North 66° 40′ East, 1013.6 feet; North 75° 28′ East, 226.4 feet; North 87° 36′ East, 297.5 feet; South 84° 38′ East, 209.4 feet; South 79° 13′ East, 323.2 feet; North 51° 36′ 30″ East, 137.6 feet; South 69° 23′ 30″ East, 733.55 feet; South 73° 08′ 30″ East, 389.1 feet; South 80° 55′ 30″ East, 340.77 feet, and South 83° 19′ 30″ East, 294.00 feet, more or less, to a point on the east line of Section 7, Town-
[fol. 61] ship 4 South, Range 1 East, Mount Diablo Base and Meridian, which bears North 70.49 feet from Engineer Station 1183 plus 47.50 of the said original constructed line.

That plaintiff Central Pacific Railway Company, by and through its lessee and co-plaintiff Southern Pacific Company, a corporation, is entitled to the exclusive possession of the whole of said strips or parcels of land hereinabove designated as Parcel "A", Parcel "B" and Parcel "C", as against the defendants and each thereof, and all persons claiming or to claim by, through, or under the said defendants, or any thereof; that the defendants and all thereof, and all persons claiming or to claim under the defendants or any thereof are without any right, title or interest whatever in or to any part of any of said parcels or strips of land hereinabove designated as A, B and C, and are hereby enjoined and restrained from claiming any right, title or interest in or to any part of either Parcel A, Parcel B or Parcel C adverse to the plaintiffs.

That the title in fee of plaintiff Central Pacific Railway Company in and to Parcel D, Parcel E and Parcel F hereinabove designated is subject nevertheless to an easement in favor of the defendant County of Alameda by reason of necessity to maintain its present right of way for highway
[fol. 62] purposes over and upon the said Parcel D, Parcel E and Parcel F, and the whole thereof, subject, nevertheless, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States" (18 Stat. 482) declaring:

"And the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road." That pursuant to the terms of said act of Congress and under the paramount title of plaintiff Central Pacific Railway Company, plaintiffs may enter upon the whole or any part of all or any of said parcels of land hereinabove designated as Parcel D, Parcel E and Parcel F, and exclude the defend-
[fol. 63] ants and all thereof, and all persons claiming or to claim under the defendants or any thereof, from the possession of the whole or any part of all or any of said parcels hereinabove designated as Parcel D, Parcel E and Parcel F; provided, however, that plaintiffs shall first reconstruct at their own expense, or at the sole expense of either thereof, in the most favorable location, and in as perfect a manner as the original road, such portion or portions of said original road as may be repossessed by the plaintiffs to the exclusion of the defendants.

That no party hereto shall have costs as against any other party.

Dated Aug. 17, 1927.

Eugene P. McDaniel, Judge Presiding.

[File endorsement omitted.]

Entered August 19, 1927. Judgment Record No. 166, p. 389. Geo. E. Gross, County Clerk, by Etta Deetch, Deputy.

(Docketed:) Aug. 22, 1927. Geo. E. Gross, County Clerk, by Jno. T. Delaney, Deputy.

[fol. 64] Clerk's certificate to judgment roll omitted in printing.

[fol. 65] IN SUPERIOR COURT OF ALAMEDA COUNTY

NOTICE OF APPEAL—Filed Oct. 10, 1927

To the above-entitled court and to the clerk thereof; to the defendants above named and to their counsel:

Take notice that plaintiffs in the above entitled action hereby appeal to the Supreme Court of the State of California from the final judgment of the above entitled court dated August 17, 1927, and entered on August 19, 1927, in Volume 166 at page 389, Judgment Records of Alameda County, in so far as said judgment holds that the title in fee of plaintiff Central Pacific Railway Company in and to Parcel D, Parcel E and Parcel F in said judgment described is subject to an easement in favor of the defendant County of Alameda to maintain the present highway of said defendant over and upon the said three parcels of land, or any part thereof, and in so far as said judgment imposes any modification or qualification whatever upon the title or right of possession of these plaintiffs or either thereof.

Dated October 8, 1927.

Frank Thunen, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 66] IN SUPERIOR COURT OF ALAMEDA COUNTY

Plaintiffs' Bill of Exceptions—Filed April 25, 1928

This cause came on regularly for trial on October 11, 1926, before the court in Department No. 6, Honorable Eugene P. McDaniel, Judge presiding, without a jury, a jury trial having been waived by the respective parties. Plaintiffs appeared by their counsel Frank Thunen, and the defendants County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Members of the Board of Supervisors of the said County, appeared by their counsel Earl Warren, District Attorney, Ralph E. Hoyt, Assistant District Attorney and J. Paul St. Sure,

Chief Deputy District Attorney; and the action was dismissed as to the fictitiously designated defendants John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow. Said trial proceeded from day to day, evidence both oral and documentary being taken. Thereafter said cause was duly argued by counsel orally and briefed on behalf of the respective parties and submitted to the court for decision; and the court having considered the evidence and the oral and written arguments and being fully advised in the premises made and [fol. 67] filed its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; thereupon judgment was duly given, filed and entered, being in part for plaintiffs as prayed and against the defendants, and in part as prayed by defendants and against plaintiffs. Plaintiffs having thereafter duly presented a motion to vacate and to set aside that part of the judgment adverse to plaintiffs and to enter a different judgment upon the findings, and said motion having been denied; and the plaintiffs having in due time and regularly presented their motion for a new trial, and said motion having been denied, the following bill of exceptions was duly proposed by plaintiffs and allowed and settled by the court for use on appeal from that part of said judgment adverse to plaintiffs and in favor of the defendants:

H. F. HARROLD, called on behalf of plaintiffs, testified:

Direct examination:

He is a civil engineer, residing in Decoto, Alameda County, California; that he had been employed by Southern Pacific Company on and off the last 20 years, and continuously for 7 years last past, his work being on the Western Division, including the line of railroad through Niles Canyon, involved in this action. He made a survey upon [fol. 68] the ground and a map therefrom (Plaintiffs' Exhibit 6 infra) of the line of railroad through Niles Canyon, also of the highway claimed by defendants as a county road and designated in the findings and judgment to the extent of its conflict with the railroad right of way as Parcels D, E and F. The map also shows the line of survey for original county road No. 247, adopted in 1859, as pro-

tracted by the witness from the original field notes (infra) on file in the office of the clerk of the Board of Supervisors of Alameda County. The railroad and right of way therefor as shown on Plaintiffs' Exhibit 6, and the center line of the highway, described in the findings and judgment as Parcels D, E, and F are made from actual surveys upon the ground. The line of original road No. 247 is protracted from the original notes of 1859, the termini, however, being checked by the witness by survey upon the ground, as to this the witness testified:

A. This is the other road—is simply a representation of the original surveyed road of 1859, No. 247, and I have located at each end of that map the beginning point and the ending point as recorded in this notice. Then I simply plotted the alignment notes as recorded and as shown by the dotted line. Apparently it does not follow the present road to any great extent.

[fol. 69] "Mr. Thunen:

Q. That is explained in the legend on the map?

A. That is explained on the map.

Mr. St. Sure: This map does not show any contour or any profile line, does it?

A. No topography, that is just a plan. There is nothing in the field notes showing the topography.

Mr. Thunen:

Q. Now, in saying that this map exhibits the conditions as you found them upon the ground, did you find this old road 247 on the ground as you have shown it by the broken line?

A. No sir, I have not.

Q. Where did you get that?

A. The field notes of 247, road No. 247. I will just read them to you (reading:) "Filed May 2, 1859. Beginning at a stake on the west side"——

Q. (Interrupting.) Never mind that going into detail. They are described on the plat. Where did you get those field notes?

A. They are on record in Alameda County in—Mr. Posey has them together with all road notes.

Q. We don't want to go into that, that is a part of your case.

Mr. St. Sure: Would be, yes.

A. You have the same thing.
Q. Survey for Mr. Posey?
A. Yes.

Mr. Thunen:

Q. But the red line mark or does that red line—that red [fol. 70] line indicates the center line of the traveled road as it exists there?
A. In Niles Canyon.
Q. As it exists today?
A. As it exists.
Q. Where did you get the data to establish your line on the plat?
A. By my survey?
Q. And you ran a line, is the course shown by its appropriate legend upon these four hundred feet, two hundred feet on the center line, and are likewise shown are they not?
A. Yes, sir.
Q. With their survey notes, I notice a great many field notes are shown on the map in connection with the establishment of the center line of the railroad. Did you make those notes in the field?
A. Yes, sir.
Q. They are as shown on the plat?
A. Yes, sir.

Mr. Thunen: We offer the plat in evidence as Plaintiffs' Exhibit No. —.
The Court (interrupting): 6, admitted."

(Here follows map, side folio 70a)

MAP IS TOO LARGE TO BE FILMED.

Cross-examination.

Mr. St. Sure:

Q. How long have you been familiar with this particular portion of this right of way of the Southern Pacific Company and the County road through Niles Canyon that we have been discussing here this morning?

A. Well, I have geen familiar with it all my life.

[fol. 71] Q. You live down in that part of the country, don't you?

A. Yes, sir.

Q. And in your capacity as an engineer, and assigned to work of maintaining or maintenance of way you also make certain surveys of the right of way in this division and you have been familiar with the existing right of way through Niles Canyon as claimed by the railroad company for some years?

A. Yes, sir.

Q. You made an actual survey of the center line of the railroad and the center line of the existing road through Niles Canyon, did you not?

A. Of the portions claimed by——

Q. (Interrupting.) Of the portions now in dispute?

A. Yes, sir.

Q. And you show upon that map which, I believe, is exhibit No. 7, upon these maps, 7, 8, and 9, you show a survey you made of that right of way? And certain other lines in addition to the center line of the railroad and the center line of the wagon road. May I ask what these lines represent? This line you state is the center line of the right of way?

A. Yes, sir.

Q. And these, lateral?

A. These are lines claimed as the right of way lines; in other words, a line which is drawn parallel to the center line of the right of way and two hundred feet on either side.

[fol. 72] Q. Two hundred feet on either side of the center line of the right of way?

A. Yes, sir.

Q. Do you show anywhere on that map the fence line of the Southern Pacific right of way?

A. No sir.

5

Q. Are you familiar with those?

A. In a general way.

Q. Where is their general relative position with regard to the center line of the right of way shown on this map?

Mr. Thunen: I object to that as immaterial, whether the right of way is fenced or whether it is unfenced.

Mr. St. Sure: If the Court is to rule that this line of testimony is immaterial the Court is preventing us from showing any other line but the claim of the Southern Pacific Company is correct; in other words, we are going to be limited in our proof as to whether or not the Southern Pacific has in fact established a right of way.

The Court: I think it would do no harm to permit certain conditions as shown upon the ground to be shown. I will overrule the objection. Read the question.

(Question read.)

A. That is a difficult question to answer directly because they have no relative——

Mr. St. Sure (interrupting): I will ask you—withdraw the question,—and I will ask you this question: Do the fence [fol. 73] lines of the Southern Pacific right of way as they now exist through Niles Canyon or that portion depicted upon this map correspond with those lines upon this map which you say represent a line two hundred feet on either side of the center line of the railroad?

A. Only in a few places.

Q. For how great a distance in these few places do they correspond?

A. At Farwell they are on the two hundred foot line for a distance of probably half a mile on both sides.

Q. Is that within——

A. (Interrupting.) A. Yes.

Q. (Continuing:) —the property described or shown upon this map? Do you know how long these fences have been in that position?

A. I do not.

Q. Now, over the remaining portion of the right of way as shown by this map in this place where the fence lines do*es* not correspond with this two hundred foot line, are the fences within the line shown upon this map or without

them, that is, are they within two hundred feet from the center line?

A. For the most part within. In fact, I don't know of any that are outside.

Q. Do you know how close these fences come to the center line, if any appreciable distance at any point in the canyon? [fol. 74] A. I have measured them at different places and some of them come to around fifty feet and some of them even less than that.

Q. And they have been in that condition for how long, if you know?

A. I don't know.

Q. How long have you been familiar with the territory through there?

A. In my present position, seven years, I have been quite familiar with the right of way condition. Before that, why, it is only in a general way that I would know where the fences might be.

Q. Has there been many changes in the fence line that you know of during the past seven years you have referred to?

A. Only one change at Farwell.

Q. What was the nature of that change at Farwell?

A. They changed the fence there for a distance of probably a thousand feet.

Q. What was the nature of that change?

A. Moved it up to the two hundred foot line on the southerly side of the track towards the creek.

Mr. St. Sure:

Q. So far as you know, so long as you have been connected with the Southern Pacific Company in the capacity of engineer and in work of the right of way, these fences have been in their present location with exception of the [fol. 75] portion near Farwell that has been moved as you have described.

A. It has.

Q. Do you know just when that change was made near Farwell?

A. I can't tell you exactly, but as I remember it about two years ago.

Q. How long?

A. About two years ago.

Q. Three?

A. Two or three years ago.

Q. Did you have any connection with the survey for that line at that time?

A. Yes, I staked the fence.

Q. You staked the fence. Could you just designate roughly on this map?

A. It is not on that map.

Q. This smaller map?

A. It is on one of the smaller maps.

Q. Just designate in pencil if you don't mind and if counsel has no objection the general location of the change in the fence.

A. Right over here at this point (indicating on the map).

The Court: How did you indicate it on the map?

Mr. St. Sure: Indicates it by two pencil marks and arrows pointing to them. And you fix these points how?

A. Guess.

Q. That is where the County road leaves the two hundred feet?

A. That is where the County road leaves the two hundred feet and here is where it enters (indicating).

[fol. 76] Q. And in that portion the fence is moved back in here, this line, there is no encroachment claimed by the Southern Pacific of the County road?

A. Down here a place in the canyon where the new fence is. The fences have been moved back two hundred feet from the line. There is one other place between our station at Brightside and Sunol where it has been moved on the other side of the tracks but the County is not interested in that.

Q. It hasn't anything——

A. (Interrupting.) It is on the outside of the track.

Q. On the opposite of where the road is?

A. Yes, sir.

The Court:

Q. The County road is on the south side of the track through the canyon. Does it cross?

A. It crosses just west of Sunol, and is on the north side for a distance of probably a quarter of a mile.

Mr. St. Sure: Yes.

The Court:

Q. And then it crosses back?

A. Yes, also on the north side just west of Farwell for a space of five or six hundred feet.

Mr. St. Sure: I think, if the Court please, if we can put this on the wall it will be better. Now, on this map, Mr. Harrold, which is a representation of your survey of four different lines, namely the center line of the traveled wagon [fol. 77] road, the road which is designated as 247; and the road claimed by the County of Alameda; and the center line of the railroad right of way; in running that line of the road known as or described on the map as road 247 do you remember what field notes you used in running that line?

A. 247?

Q. Yes, the old road, the one that was surveyed in 1859?

A. I didn't rerun that. That is simply a representation of the field notes on that map.

Q. Well, then, how did you achieve the transfer of that line from the field notes to this map? Just by plotting it according to the field notes?

A. No, sir, I will explain that to you: At this point, the beginning point of that road 247 which is described as being six chains, as being, as having a certain bearing on Bertrand Bedan's store at Sunol and also a live Oak tree. This was established by old time residents of Sunol as they showed me where this store was and here is—I found the live oak and also the road as originally built and started out at that point [illegible] then I go down to Niles and find the ending point of this road.

Q. How did you establish that?

A. Through the aid of one of the old residents, Mr. Richards, of Niles. He showed me the Vallejo Mills and [fol. 78] also the position of the store, and from which point I was able to determine the center of the present road is the center of the old road at that point, and I tied this in to our center line on our track which I had surveyed clear through. I was unable to plat them on this map. Then I took notes of the old road and I plotted them on the map and using both ends in here (indicating). There and at that end just simply plotted it.

Q. In other words, you got from the old residents down there an idea as to where these beginning and ending points

were and fixed them to your satisfaction as the points of beginning and ending of this road and then traced those upon this map of your center line of the right of way and then took the field notes and plotted out the road between. You made no attempt to survey that road?

A. No, sir.

Q. In the fixing of these center points or these beginning and ending points—does any portion of Bertrand Bedan's store stand today?

A. No, it does not.

Q. And you fixed that place, that little square you show upon the map there, from a statement of some of the old settlers there?

A. That is correct.

Q. Is the position of the store?

Mr. Thunen: Now, I beg your pardon. I think the witness testified that the old road is still there.

[fol. 79] Mr. St. Sure: I was coming to that. I would like to know how he knows it. You fix the first point, Bertrand Bedan's store, by information given you from old settlers and then you found a live oak tree—is that the only live oak tree around there?

A. Yes, and it corresponds exactly with the position as called for by the notes.

Q. And you took your starting place as the place fixed by the settlers?

A. Yes, sir.

Q. You say that there is evidence of a road having once existed there. Don't you show the beginning of this road on the map?

A. Yes, I remember after he showed it to me, that that was the road I had traveled on.

Q. You had traveled on that road formerly?

A. Yes, sir.

Q. How long since?

A. Oh, that was back over twenty-five years ago.

Mr. St. Sure:

Q. Now, Mr. Harrold, we can go back to this diagram, Plaintiffs' Exhibit No. 6, and we were discussing the line of road No. 247 as it appears on this map, and you said, I

believe, the manner in which you fixed the points of the beginning and ending of that line. Now, you mentioned that there was an appearance or a trace of the original road at the southeast portion of the road as it appears on the map, a point near Bertrand Bedan's store?

A. Yes, sir.

[fol. 80] Q. Did you follow the line of that road for any distance to determine whether or not in which direction it ran? and how far it was apparent?

A. Only as Mr. Bedan showed to me. I could see it cross the flat and it checked very closely with what I saw.

Q. Did you make a survey of it then?

A. No, I didn't make any survey.

Q. When you say you checked it closely for the line, you checked it very closely?

A. In a general way.

Q. This line here. And that is how far from the entrance to the land here in dispute, as it appears on this map?

A. I will have to measure that. About four thousand feet.

Q. That is roughly four-fifths of a mile?

A. Yes, sir.

Q. And this point at the other end of the canyon, at the western end, is there anything on the ground there that would have indicated the points that are given in the field notes of the original survey from which you fixed the point or direction on this map?

A. There is one point there, that is the southwest corner of Vallejo Mills.

Q. It still stands there?

A. Yes, it is there.

Q. What is the other point?

A. The other point is Scott's store. I remember in all [fol. 81] the reports they showed this, where that store was. I remember that.

Q. Was there anything on the ground?

A. No, there is nothing there except a fence. There is an old oleander bush which shows and it was established there at the same time.

Mr. St. Sure: That is some four thousand feet from the entrance to the property in dispute.

Q. This has been taken—this has been fixed by taking the line from the southwest corner of Vallejo Mill. The foundation I believe, is still there?

A. Yes, sir.

Q. And the line from the corner of Scott's store. You have placed it upon the map upon your own memory and the memory of Mr. Bedan—Mr. Richards?

A. Yes, and the two intersections came right in the center of the present roadway.

Q. The two intersections came right in the center of the present roadway?

A. Which would assure one that this is the starting point.

Mr. St. Sure: I ask that last part go out as being a conclusion.

The Court: It may stay in, it won't do any harm.

Mr. St Sure:

Q. Now, how far is that from the entrance to the property in dispute here?

[fol. 82] A. Well, it is probably two miles.

Q. Two miles. Now, in plotting out this line of the old road 247 and placing it between these two points which you fix in the manner you have testified, how do you fix the direction and distance as you go to Niles on the map?

A. Why, simply figuring on the traverse through there when you get through.

Q. You say you figured it. How did you figure, do you mean you based that as a correct direction and distance as appear upon this map, as the line of the old road No. 247?

A. Yes, as they are represented there in the field notes.

Q. You took it from the field notes?

A. The field notes, exactly.

Q. That were made in 1859?

A. 1859, that is it, exactly.

Q. What was the method of surveying as portrayed from those field notes, is it the same as you would do if you were surveying that road?

A. No, sir.

Q. It is by compass and point direction?

A. Very largely.

Q. Do you believe that you could resurvey that line as it appears from these field notes?

A. I don't know whether it could be resurveyed or not. It might be.

Q. At best these representations or figures were taken from the field notes and not an actual survey?

A. That is it.

[fol. 83] Q. Have you any idea or did you trace or follow or examine the place where this line as it appears on this map would come in Niles Canyon if it were actually surveyed as it appears here?

A. I didn't go out on the ground.

Q. You are familiar with Niles Canyon and the contour of that property?

A. Yes, sir.

Q. Just glance at this map. Where in your opinion would this road run in this place where it appears on the map, would it run in the canyon or in the creek or up the hillside?

A. Up the hillside.

Q. Is there any trace of a road there?

A. There is in one place, yes.

Q. Where is that?

A. That is at Farwell, right about in here. This road shown here follows pretty closely with the old road, so that probably the old road went up further at one time (indicating).

Q. Is there any other place that is near the mouth of the canyon, near where it opens up or broadens out?

A. No, but it is very close in there.

Mr. Thunen:

Q. Will you state to the court particularly which road, so we can get it into the record, point to which you are now referring. Pardon me for interrupting.

[fol. 84] A. Well, that is right at Farwell station for a distance of maybe a thousand feet easterly and the road is distinctly up towards the hillside of the canyon from the present location.

Mr. St. Sure: Now, I am asking—I withdraw the question. I am asking him in his opinion as an engineer and also a person familiar with the contour of that land whether or not the road which he has described and laid out upon this map, whether that road could be used as a road.

Mr. Thunen: I object to that question upon the ground that no foundation is laid for it. It has not been shown that there ever was a road on that line.

Mr. St. Sure: I am asking him in his opinion as an expert if there could be such a road.

The Court: I will overrule the objection, because he said he made this survey and fixed that road from the old field notes of the original survey.

Mr. St. Sure: Go ahead.

The Court: I want to bring the facts of the whole situation before the Court and I think it would be competent to testify whether or not this is a feasible roadway.

Mr. Thunen: If the question is limited to whether a road could be constructed on that line.

[fol. 85] The Court: I think that is the question. Read the question.

(Question read.)

A. It could.

By Mr. St. Sure:

Q. Does it go over the hillside or does it follow the canyon, that is the bed of the canyon, follow the course of the stream?

A. Goes over the points of the hillside and up at the creek.

Q. Goes over the points of the hill?

A. Yes.

Q. Doesn't skirt them, doesn't go around them?

A. No, goes over.

The Court:

Q. It is an up and down course?

A. Yes, would be more or less up and down, wouldn't go in the bottom of the creek at all.

"Mr. St. Sure:

Q. And would not it be the same line, the line that is shown here, the line which goes up and down over the hills would be the same distance over the creek there?

A. Yes, sir.

The Court:

Q. Is that all within the two hundred foot boundary?

A. Well, most of it. Some of it is only a small portion.

Mr. St. Sure:

Q. Do you know how close the slope of the hills on the north side of the railroad right of way comes to the center line of the right of way as it now exists?

[fol. 86] Mr. Thunen: I object to that unless counsel refers to some specific point of the right of way?

Mr. St. Sure: At the nearest point?

The Court: Do you mean at the narrowest part of the canyon, Mr. St. Sure?

Mr. St. Sure: Yes.

The Court: All right. I will allow it that way.

A. Just what point do you mean?

Mr. St. Sure:

Q. I am asking you, Mr. Harrold, can you indicate on the map the nearest part of the canyon, where the nearest part of the canyon is right about at this point (indicating)?

The Court: Make a mark.

Mr. Thunen: This point doesn't mean anything in the record.

Mr. St. Sure: How would you indicate that on the map?

A. We will call it engineer's station 1075.

Q. Engineer's station 1075, that appears upon this map. Plaintiffs' Exhibit 6?

A. Yes, sir.

Q. At that point how near does the northern wall or the northern slope of the canyon come to the center line of the right of way as it appears on that map in your opinion?

A. Well, of course, over there the center of the railroad is built on a ledge.

Q. Cut right into the side of a hill?

A. Cut right into the side of the hill.

[fol. 87] Q. This line of the road 247 would be further up the hill?

A. From that point.

Q. What is the distance between the right of way of the railroad and this line of 247?

A. Not very much, well, 1075—would be about one hundred and twenty-five feet.

Q. That would be sufficient to take it over the hill?

A. No, sir.

Q. What you mean is, the road would be further up the hill on the ledge, above the right of way of the railroad?

A. Yes, sir.

Q. Is there any trace of such a road on the side of the hill?

A. No.

Q. There would be if such a road existed?

A. If the road had existed there would have been a trace of it.

Q. And there is none along the side of the hill at that point?

A. No, sir."

Mr. St. Sure:

Q. On the opposite side of the center line of the right of way from the creek is a fence placed two hundred feet from the center line?

A. No, sir.

Q. Would it have been possible practically to put this fence on such right of way two hundred feet from the center line?

A. Yes, sir.

Q. As a matter of fact, they never were nor are not now on the two hundred foot line from the center line of the right of way?

A. No, sir.

[fol. 88] The Court:

Q. In other words, the fence did not mark the boundaries of the four hundred foot strip?

A. No, sir.

Mr. St. Sure: You mean claimed by the railroad?

Mr. Thunen: Now, that question calls for——

Mr. St. Sure (interrupting): To your knowledge the knowledge of the witness and his experience as an official of the company and also as a resident of that district.

Q. On that survey of road 247 that you plotted upon the map did you use any other fixed points that you had determined or could determine from the field notes other than those two at the beginning and ending of the line?

A. I have never determined any except two. Now, whether there are any in between that could be determined or not I don't know.

Q. Are there any referred to definitely in the field notes?

A. That I can't—If you will just let me look at them I can tell. There are a few white oak trees and things of that kind mentioned on my tracings but you would have to find them to establish your center line of your road from them if these could be found.

Q. You didn't make any effort to find any of them?

A. No, sir.

[fol. 89] Q. And if these could be found they would establish more accurately the line of this road would they not?

A. Absolutely.

Q. Without these points intervening between two terminal points the type of survey made as appears from the notes from which you drew this line is inaccurate and is considered inaccurate under present day methods of surveying, is it not?

A. Yes, they would have to retrace the road, to put it in itself in position, they would have to have these other points to check it up.

Q. And without compass and point direction the map would be rather inaccurate?

A. Without some tie in points, just by these two points——

Q. (Interrupting.) These are the only tie in points you have on that line which is for how long a distance, ten miles?

A. Eight to ten miles.

Defendants offered in evidence the record of the Board of Supervisors of the County of Alameda embracing the proceedings for the survey and opening of County Road No. 247, including the petition dated November 9, 1858 and the

field notes and plat of survey made in 1859. To this offer plaintiffs objected upon the ground that neither at the time of said proceedings nor at any time until some years after the title to the railroad right of way had been transferred [fol. 90] from the government to the Central Pacific Railroad Company of California was there any provision whereby the County of Alameda could have acquired a right of way over the public lands of the United States.

The Court: I think the field notes are admissible under the theory that the plaintiff introduced what purported to be a map based upon the field notes and you certainly would have a right to show what the field notes actually were if for no other purpose. Objection overruled—may be defendants' Exhibit B.

To this ruling plaintiffs reserve an exception, which for convenience is hereby designated as

Exception No. 1.

The proceedings referred to, embracing the petition, plat and field notes relative to County Road No. 247, are in words and figures following:

DEFENDANT'S EXHIBIT "B"

To the Honorable the Board of Supervisors of the County of Alameda:

The undersigned citizens of said County respectfully represent to the Board aforesaid, that a public highway commencing where the County Road intersects the Alameda Creek near Vallejo's Mill and following up said creek and intersecting the Stockton road so-called near the residence [fol. 91] of Bertrand Bedan is greatly needed for the convenience of the citizens of the County aforesaid, and they respectfully pray the Board aforesaid to locate a road between the two points above specified and to declare the same a public highway.

Benj. Williams, E. Chamcey, H. W. Smith, C. Cornell, E. Russell, Esq., E. H. Dyer.

Upon reading the foregoing petition and the Board being satisfied that the petitioners are citizens of the County of Alameda, it is now ordered by the Board here that —— —— be appointed to notify the parties owning or in possession

of the land over which said road shall be located of the pendency of the petition and to make report to the Board at its next meeting, on the — day of ——, ——.

(The following endorsement appears on this document:) "247. Petition for Road, Washington Township. Filed Nov. 9, 1858. H. C. Vesey, Clerk, by I. A. Amennan, Deputy Clerk."

[fol. 92] Field Notes

Begin at a stake on the west side of the road from the Mission of San Jose to Stockton from which the east gable of Bertrand Bedan's store bears S. 15½° W. about 6.00 chi. distant a white oak 18 inches diam. bears N. 44° 50′ E. 56 link and a live oak 16″ diam. bears N. 36¼° E. 45 Link; thence

Sta. 1. S. 86½° W. 6.00 chi. to station on S. E. Bank of Alisal creek.

2. S. 56¼° W. 3.00 chi. across creek. 7.00 chi. to station W. Oak. 15″ N. 22½° 86 lks. W. Oak. 15″ S. ½° W. 18 links.

3. S. 84½° W. 43.00 chi. to station from which W. oak 2 ft. N. ½° W. 122 links—W. Oak. 2 ft. N. 50° 50′ W. 98 lks.

4. N. 76¾° W. 26.00 chi. to sta. from which W. Oak 14″ diam. bears S. 15¼° E. 41 lks. W. Oak 36″ diam. bears N. 17° 10′ E. 223 links.

5. N. 65¾° W. 19.00 chi. to sta. from which W. Oak 9″ diam. bears N. 38° E. 75 links. W. Oak. 36″ diam. bears N. 8¾° E. 180 links.

6. S. 84° W. 5.08 chi. to sta. being a W. Oak 4″ diam.

7. S. 79¼° W. 4.73 chi. to sta. from which a live oak. 12″ diam bears S. 33 E. 44 lks.

8. S. 68¾° W. 11.50 chi. to sta. being a sycamore tree 2 ft. diam.

[fol. 93] 9. S. 69° W. 16.00 chs. to sta.

10. N. 82¾° W. 15.00 chi. to sta. from which a W. oak 7″ diam. bears N. 56° E 45 lks.

11. N. 70° W. 4.39 chi. to sta.

12. N. 51¾° W. 5.00 chi. to sta. from which a live oak 16″ diam. bears S. 39¼° E. 115 lks. A L. Oak 27″ diam. bears S. 86¼° 82 lks.

13. N. 44½° W. 23.39 chi. to sta. from which S. E. cor. of E. H. Dyers' house bears N. 40′ W. Live Oak 4 ft. diam. bears N. 69° E. 318 lks. Live Oak, 1 ft. diam. bears N. 75° E. 227 lks.

14. N. 62° W. 14.00 chi. to sta. from which a sycamore 27″ diam. bears S. 23° E. 154 lks. A live oak 15″ diam. bears N. 58½° W. 180 lks.

15. S. 85¾° 10.25 chi. to sta. from which a sycamore 2 ft. diam. bears S. 73¼° E. 85 lks. Oak 10″ diam. bears N. 25¼° E. 36 lks.

16. S. 50½° W. 5.00 chi. to sta.

17. S. 38° W. 7.75 chi. to sta. on point of rock.

18. S. 53° W. 4.83 chi. to sta. being a live oak 17″ diam.

19. S. 61½° W. 9.53 chi. to sta. a syc. tree 16″ diam. bears S. 43° E. 27 links.

20. S. 33¼° W. 9.00 chi. to sta.

21. S. 15¼° W. 9.20 chi. to sta. being an alder tree 13″ diam.

[fol. 94] 22. S. 59° 50′ W. 8.88 chi. to sta. a live oak 12″ diam. bears N. 4° E. 42 links. A syca. tree 2 ft. diam. bears S. 17½° W. 52 lks.

23. S. 78¼° W. 360 chi. to sta.

24. N. 64¼° W. 7.00 chi. to sta.

25. N. 28¼° W. 4.00 chi. to sta. from which a syc. 14″ diam. bears S. 21° W. 25 lks.

26. N. 12¼° W. 12.60 chi. to sta. from which a cotton wood 10″ diam. bears S. 81½° W. 56 lks. 2 Syc. tree- 2 ft. diam. bears N. 44½° W. 65 lks.

27. N. 10 E. 10.00 chi. to sta. from which the S. W. corner of Maxwell's log house bears N. 39½° E. 67 links.

28. N. 12¼° W. 6.50 chi. to sta.

29. N. 41½° W. 3.00 chi. to sta.

30. N. 64½° W. 3.50 chi. passes 50 lks. south of Bonner's House. 7 chi. to sta.

31. N. 78° W. 3.14 chi. to sta.

32. S. 78¼° W. 4.00 chi. to sta. from which a syc. tree 11″ diam. bears S. 30½° E. 53 lks. A syc. tree 11″ diam. bears N. 8½° E. 15 links.

33. S. 56¾° W. 5.00 chi. to sta.

34. S. 42¾° W. 7.00 chi. to sta.

35. S. 55½° W. 2.00 chi. to sta. on Rocky point.

36. S. 79¾° W. 4.00.

[fol. 95] 37. S. 84½° W. 9.00 chi. line passes 54 links S. of Wm. M. Bonner's house. 14.00 chi. cross north creek. 17.30 chi. to sta. from which an Oak 15″ diam. bears N. 82¾° E. 102 lks. Syc. 12″ diam. bears N. 88¾° E. 84 lks.

38. S. 83¼° W. 9.00 chi. to sta. from which an oak 27″ diam. bears N. 10½° W. 60 links. Syc. 8″ diam. bears N. 54½° W. 37 links.

39. S. 70¼° W. 3.00 chi. to sta.

40. S. 62° W. 2.00 chi. to sta.

41. S. 49½° W. 2.00 chi. to sta. from which an oak 2 ft. diam. bears N. 72½° W. 59 lks. Syc. 12″ diam. bears S. 60° W. 38 lks.

42. S. 42¼° 3.00 chi. to sta.

43. S. 18¼° W. 1.28 chi. to sta. being the northerly part of Mill Race Gate.

44. S. 16¾° W. 3.08 chi. to sta. being a cottonwood tree 8″ diam. 4 ft. S. of race.

45. S. 34° W. 596 chi. to sta. 12 ft. s. of Mill Race.

46. S. 41¾° W. 7.50 chi. to sta. from which A. Rankin's house on south side of River bears S. 27° E. A Sycamore tree, 20- diam. bears S. 46¼° E. 90 links.

47. S. 21¼° W. 2.00 chi. to sta.

48. S. 42¾° W. 4.90 chi. to sta. being a syc. 3″ diam.

49. S. 32¼° W. 8.30 chi. to sta.

[fol. 96] 50. S. 41¾° W. 4.00 chi. to sta.

51. S. 13½° W. 4.00 chi. to sta. 8 ft. E. of Race & 9 ft. N. of Waste gate.

52. S. 1¾° E. 2.00 chi. to sta.

53. S. 15° W. 6.00 chi. to sta. being a sycamore tree 3 ft. diam. near old crossing.

54. S. 37¼° W. 10.00 chi. to sta. from which an oak 10" diam. bears S. 8° E. 60 lks. An oak 14" diam. bears; N. 85° W. 31 lks.

55. S. 65¼° W. 11.00 chi. to sta. from which a sycamore tree 3 ft. diam. bears West 86 lks. An oak 11" diam. bears S. 19¾° E. 131 lks.

56. S. 52½° W. 12.35 chi. to sta. from which a sycamore 3 ft. diam. bears S. 62¾° W. 99 links. An alder 15" diam. bears S. 56¼- E. 85 lks.

57. S. 11° E. 0.90 chi. to N. side of creek. 2.20 chi. across creek. 5.00 chi. top of bank. 5.30 chi. to sta. from which an oak 14" diam. bears S. 59¾° W. 108 lks.

58. S. ½° W. 17.74 chi. to sta. for which a syc. 5 ft. diam. bears N. 85° 132 lks. An Oak, 16" diam. bears N. 4¼° E. 209 lks.

59. S. 23½° W. 10.05 chi. to sta. from which a syc. 3 Ft. diam. bears N. 60½° E. 188 lks. A syc. 2½ ft. diam. bears S. 25¾° W. 59 lks.

60. S. 47½° W. 7.17 chi. to sta.

[fol. 97] 61. S. 73¾ W. 13.85 chi. to sta. from which a syc. 4 ft. bears S. 6½° E. 29 links. A syc. 20" diam. bears N. 68° W, 85 links.

62. S. 51¾° W. 13.07 chi. to sta.

63. S. 75¼° W. 2.20 chi. to bank of creek. 3.40 chi. across creek. 7.30 chi. to sta. on E. side of road from Vallejo's Mill to the Mission of San Jose—S. W. Corner of Vallejo's mill bears N. 4¾° W. 360 lks. and the S. E. corner of Scott's store bears, N. 86¾° W. 191 links.

The courses are from the true mer. mag. var. 16° E.

The posts were set on the surveyed line being the center of the road at each angle and properly marked.

I hereby certify that the above are the true field notes and plat of a survey made by me by order of the Board of Supervisors of the County completed this day.

Jas. T. Stratton, Co. Surveyor, Alameda Co.

(The following endorsement appears on this document:) "247.4. Plat and Field notes of a survey of Road from Vallejo's Mill up the Alameda Creek to the Stockton Road [fol. 98] near Bertrand Bedon. Filed May 27, -859. H. N. Vesey, Clerk, by I. A. Amennan, Deputy Clk."

Copy of map of survey for Road No. 247 inserted here).

(Here follows map, side folio 98a)

MAP IS TOO LARGE TO BE FILMED.

Defendants offered in evidence photostatic copies of the petition for the establishing of said county road No 247 and also photostatic copies of portions of the minutes of the Board of Supervisors, which said copies of the minutes of the Board of Supervisors were admitted and marked defendants' Exhibit C and were in the words and figures following:

(Vol. No. 1, Nov. 9, 1858)

DEFENDANTS' EXHIBIT "6"

In the Matter of Roads and Highways

A petition being presented for a road in Washington Township, as follows: Commencing where the County Road intersects the Alameda Creek near Vallejo's Mill, and following up said creek, and intersecting the Stockton Road, so-called, near the residence of Bertrand Beden. On Motion E. A. Dyer is hereby appointed to notify parties owning the land or living on the line of said road to be and appear before this Board at their next regular meeting, to make objections, if any they have.

[fol. 99] (Vol. No. I, Feb. 8, 1859)

Tuesday afternoon, February 8, 1859.

Board met pursuant to adjournment. Present: Same members as in morning session.

In the Matter of a Road on Alameda Creek

A petition having been heretofore presented praying for a road commencing where the County Road intersects the Alameda Creek, near Vallejo's Mill, and following up said Creek, and intersecting the Stockton Road, so-called, near the residence of Bertrand Bedon, the consideration of the same came up on the report of the committee appointed to notify parties owning land, and the remonstrance of parties interested, and the Board, being fully advised, do now order, on motion, that the Co. Surveyor be and he hereby is ordered to survey out and locate the road according to the prayer of the petitioner.

247.4. Plat and Field Notes of a survey of Road from Vallejo's Mill up the Alameda Creek to the Stockton Road near Bertrand Bedan Rd., up Ala. Ck. from Niles to Sunol. Filed May 27, '59. H. N. Vesey, Clerk, by T. A. Amennan, Deputy Clk. 247.

[fol. 100] (Vol. I, May 3, 1859)

In the Matter of the Road from Vallejo's Mill up the Alameda Creek to the Stockton Road, Near Bertrand Bedon's

On motion, it is ordered by the Board that said Road as surveyed and located by the County Surveyor, and duly recorded herein, be and the same is hereby declared a Public Highway, of the width of four rods, and the Road Commissioner is hereby directed to have the same opened forthwith. And the original petition for said road is hereby continued until the next regular meeting of this Board, and all persons aggrieved shall present their petition for redress at said meeting.

Mr. Thunen: We move to strike out all the documents offered in support of road No. 247 upon the ground that they do not show that the road ever was actually opened or accepted by the County or that the road ever did actually exist as contemplated by that petition and by the survey.

"The Court: I suppose that will come later as a part of the testimony.

Mr. Thunen: That is all you are offering?

[fol. 101] Mr. St. Sure: In the way of documents. There will be testimony that the road was opened.

The Court: Objection overruled and the motion to strike out is denied.

To which ruling plaintiffs reserve an exception, which for convenience is hereby designated as Exception No. 2.

Israel Richards, called on behalf of defendants, testified that he resides in the Town of Niles at the westerly end of Niles Canyon, and that he has been familiar with the Niles Canyon since the year 1863 and before the time that the plaintiff railroad was constructed in the Niles Canyon.

"Q. So you have a recollection of Niles Canyon before the railroad came through?

A. Before the railroad came.

Q. I will ask you whether or not in your memory there was a wagon road through the Canyon prior to the railroad coming there?

Mr. St. Sure:

Q. Have you ever been over or did you ever traverse or travel the road through Niles Canyon before the railroad was built?

A. Yes, sir.

Q. On more than one occasion?

[fol. 102] A. Several, used to go on horseback most of the time.

Q. You already stated there was such a road. Do you recall the relative position of that road with reference to the creek?

A. It run from Niles just about directly where it starts in now, from the old road coming out from Hayward through Vallejo Mills and runs just about as it does now, I will say just below where the Spring Valley dam is, the first dam in the Canyon.

A. (Continuing:) In the Canyon and crossed the creek below the Spring Valley dam, not over two hundred yards I would think, to the south side and again ran up about a half a mile or maybe less than that and into the creek crossed to the Fernbrook side and came out over a little knoll where Fernbrook is at present, and then down over the knoll into the bottom of the creek and again followed that up along what is now the right of way of the Southern Pacific, possibly it might have been inside of their right of way, along the southerly side of the creek up to what we call the long crossing. That was a rather rough crossing, it wasn't deep, it was very shallow, but at the lower end where they started there was a number of boulders which they had to work around, it was the Long crossing, and went out on the other side, on the south side of the [fol. 103] creek again, and went possibly a half a mile or a quarter above that and crossed the creek to the northern side again and kept there completely on the northern side of Sunol, practically right alongside where the railroad

track is now, the road runs a great deal the same as it does now.

The Court: Better exhibit the map to him.

(Plaintiffs' Exhibit No. 6.)

Mr. St. Sure:

Q. You understand that this map——

A. (Interrupting.) I suppose it shows what they figure is the old County road?

Q. Yes, the old County road from Niles beginning at a point at Vallejo Mills?

The Court: Show him where the Canyon is.

A. I don't understand this. Is that the Mayberg side, this curve, what we call the Mayberg curve? Then the road came up, going over here; this is called Fernbrook and going over here down into the creek and followed along on the south side here to Mayberg's house. Mayberg had a house in there, and the Long Crossing would be right, right along in this corner (indicating).

Mr. Thunen: Pointing to the Mayberg curve as the Long Crossing.

A. Beyond the Mayberg curve just about, just a short distance between Mayberg, the easterly line is possibly fur- [fol. 104] ther back, and also through the cut, that was called the Long Crossing, and we crossed over to Maybergs from the northerly bank of the creek, we crossed here along up here and came up just, I think, beyond Mayberg's line.

Mr. St. Sure:

Q. Now, you referred to, when you began to describe the road, Mr. Richards, the place that you spoke of as Fernbrook, would you point that out on this map?

A. In here, as I understand it (indicating).

Q. On this map that shows—well, it would be in the neighborhood of the section of land between Section 10 and 110, that crossed right here, the line shown on the map directly to the right on that map?

A. We used to come down into the creek just before we got to Fernbrook. It crossed the creek and got out on steep

rise. It was not very high, possibly two hundred feet or maybee three and then came over and down the other side and pitched down into the creek, down in here and right along here (indicating).

Mr. St. Sure:

Q. Where you speak of that crossing—we start at Fernbrook now, could you take it step by step, as you remember the road as it existed—I call your attention to the map, this [fol. 105] shows the creek and this double line shows the creek and the red line shows the County road as it exists today and this line, this straight line, this line here shows the center line of the railroad as it exists today. Now have you in mind these three lines? This line here is the railroad line and here is the line of the creek. Can you slowly trace the road as you remember it, the old road from the point at Fernbrook, as you fixed Fernbrook on this map to the other end of the Canyon?

A. This is the Central Pacific Railroad Company?

Q. Yes.

A. This is the county road.

Q. Here is where the point begins. The road as it exists today does not show on this particular map. This red line is the road as it exists today and begins at that point on this map (indicating).

A. Oh, then, we have this here at Fernbrook.

Q. We indicate Fernbrook as about the point where the red line begins on this map.

A. This section line. Yes, they came down the hill there and followed along and crossed onto—I suppose they are little trails in red. I don't understand.

Q. Are you describing the old road or the existing road?

A. No, this road you have here, down until it crosses the creek at Mayberg's on Mayberg's side, is practically [fol. 106] the same road that we had in those days.

Q. You place Fernbrook beyond the Mayberg property?

A. The Mayberg property comes up over here, this runs across the creek, this road over here and over the bridge here, and this is Mayberg's and the creek. The road is used to run in the old days, it ran on the northerly side

of the creek until it got to the Long Crossing, and then it came over the stream into Mayberg's.

The Court: Make a mark where it crossed.

Mr. St. Sure:

Q. Where did it cross, as you remember?

A. At the Long Crossing and came over we will say, on this side, crosses into here (indicating).

Q. I will make a mark there where Mr. Richards places it, make an R, if I may, I will put it R1, with a cross on the map where Mr. Richards has placed where the old crossing merged into the Long Crossing that he has reference to. Mark that Long Crossing, the beginning, Mr. Richards?

A. It is pretty hard to tell, but the Long Crossing would be just about that curve, would come, would start just about——

The Court (interrupting): Put a mark two.

[fol. 107] A. We will call this the curve and down—the Long Crossing would be here, right in here.

The Court: Put R2 there.

A. For the point.

Mr. St. Sure:

Q. Make the Crossing R2, that is the relative position?

A. Practically the crossing. The road followed up on this side a ways and went down into the creek and crossed again and kept up entirely on that side. Now, it crosses over the Western Pacific Tunnel, this is the present line, I suppose, crosses the bridge over into the old road again. That road extended away down below that bridge and came down along in the creek and crossed in here somewhere (indicating).

The Court: Make that R3.

A. Yes, crossed here and ran down that line and then in here crossed the creek and came up on the right hand side.

Mr. St. Sure:

Q. Until what point?

A. Until you came into Sunol. This now is the bridge, crosses the creek, as I understand it, the bridge up there, and that bridge, there is a crossing, and the road came up to that point. They put a bridge in after they put the Mayberg road in here.

Q. You speak of the old road. Now the roads came together. Can we put a mark, point, where you believe [fol. 108] these two roads came together.

A. They came in here at this bridge.

The Court: R4.

Mr. St. Sure: R4.

A. Over this way, and this road was on that side and came down to the Long Crossing.

Q. From the point R4 where the bridge is now in your opinion and in your memory the old road and the present road were the same?

A. Just the same as it runs today?

Q. From there into Sunol?

A. Yes.

Cross-examination.

Mr. Thunen:

Q. Isn't it a fact, Mr. Richards, that the road was changed some thirteen years ago?

A. The present road?

Q. Yes.

A. The only change that there is, the two changes made in the road, the old road is as I have tried to describe it there.

Q. Yes.

A. One was from the crossing below the Spring Valley Dam; they took the northern side of the creek and cut around in the side of the hill that the Southern Pacific or the Central Pacific wouldn't take out, to fill their mole at the Oakland yard. I worked for them at that time. Then, after you cross, after you go by Fernbrook down [fol. 109] into the creek again they have built a bridge that we used to go around right under the Southern Pa-

cific tracks, they built a bridge across on the Mayberg side where his home was. Now, instead of going around the big crossing they cut up over the Western Pacific tunnel and cut around that bridge, that was above, quite a distance above where we crossed the creek onto the northern bank, on the old road.

Q. What was the total length approximately of the changes made in 1913 or thereabouts?

A. Well, it would be a little hard for me to tell the total for the reason that I was working at that time in the tower, from 1908 I have been steady in the tower. Before that I was in, on the County road, working at different times a great deal in the canyon, but they made a change in that, there is quite a change made.

Q. Made a number of changes, did they?

A. There is only two that I know of.

Mr. St. Sure: If the court please, upon that subject at that time the only changes referred to by the witness, he spoke of, being before you come to Fernbrook, and that would be the outside of the property now in dispute and the only change that he has referred to that is within the property he described around Mayberg.

[fol. 110] The Court: Called the "Long Crossing."

Mr. St. Sure: Yes, called the Long Crossing.

Mr. Thunen:

Q. Now, between Fernbrook and Sunol, how many, what was the, approximately, the length of the road the change made in 1913?

A. Between?

Q. Yes, between Fernbrook, as I understand it, Fernbrook is about the beginning of the red line shown on the map, the western end of it.

A. Well, say this is Fernbrook, you come down, come along—I suppose there are little curves, short turns in the road until you cross that bridge beyond the Mayberg side, that road line, where that red line would be now.

Q. Where was it, where did it go, where was it prior to 1913?

A. Why, we had in 1913, we had to come around on the Mayberg side. I think was way back of the crossing; I

wouldn't be positive now. But that old road ran along there, and now over here (indicating).

Q. That is opposite the Mayberg curve?

A. Yes. That Long Crossing comes in by what we call the Mayberg line, his land, his piece over there, and that used to go a little ways and then go down into the creek again, down a little steep hill, like a bank, eight or ten feet, and run along—go down to the creek where it crossed [fol. 111] and kept entirely then over there. At the present time it is entirely new and comes along by the Spring Valley flume and above the Western Pacific tracks and crosses over on the Western Pacific, what we call the little tunnel. The big tunnel is about in here and the little tunnel is here, up here, just before you get down into that bridge (indicating).

Q. The bridge?

A. Yes, the bridge crosses over to the northern bank, as we call it, and it goes clean through, the old road did at that time. The old road started and came over here running down in here and crossed in here and came down (indicating).

Q. How many times did you cross the creek in the old days between Fernbrook and Sunol?

A. Between Fernbrook and Sunol?

Q. Yes.

A. Twice.

Q. This crossing you have pointed out in that direction (indicating)?

A. I pointed out the Long Crossing, the crossing before you get to the bridge on that side of the Long Crossing, you go right along.

Q. Wasn't there a crossing up there from R1 to R2?

A. That is the Long Crossing.

Q. That is the Long Crossing?

A. That is the Long Crossing. There was afterwards, [fol. 112] after this old original road in here when it was washed out, came on the Southern Pacific side, it washed out, the road ran between the Southern Pacific fence and the creek. It washed out back there, there was a washout in there and I remember that Fred Froeck one night drove into the hole. The road cut across and made a crossing there and cut across down here again at the Long Crossing,

and then afterwards cut around by Mayberg's. That is along after this old road—that isn't—this red line don't mean the old road. It is practically the new road now.

Q. There were a number of little changes made from time to time on account of washouts, were there not?

A. Only one change I ever remember of in the main road was that change of the crossing on the Mayberg side.

Q. When did you first go through the Canyon on that old road?

A. Some time the latter part of 1863 or early in 1864.

Q. Did you go clear through the Canyon there?

A. No, not at first, I think three times we went up above what we called Captain Troth's place at that time.

Q. Where is that?

A. Right where the bridge crosses now. He was on the northern side. He had a home there at that bridge crossing.

[fol. 113] Q. Showing R4 on the Exhibit?

A. Yes, where the bridge crosses now on the Sunol side.

Q. When did you first go through the point you have just mentioned at Sunol, on the old road?

A. Why, it was sometime in 1864, along in—I could not be positive because I was a boy. We used to ride through on horseback sometimes, and we used to hunt up that road.

Q. Didn't you travel in the bed of the creek a good deal of the way?

A. No, sir, we didn't, in the bed of the creek. Most of our travel down in here was in the bed of the creek.

Q. This part (indicating)?

A. From Fernbrook down around until we got here to the Long Crossing, and then into the creek again, and crossed, and then we would be on high ground all the way up.

Q. Do you remember when the railroad was built?

A. You mean the Western Pacific?

Q. Yes; up there through the Canyon?

A. I wouldn't remember the date, 1864 or 65, along in there.

Q. You were in there at that time?

A. I was living there then and used to go up to the [fol. 114] Tunnel, above the top, up there where they was building it, Scott and his wife boarded men.

Mr. Thunen: That is all.

Redirect examination.

Mr. St. Sure:

Q. That old road di-n't go up over the hills, on the northern part or side of the Canyon, it didn't go over the hills?

A. No, sir; the only place it touched would be up at Fernbrook over near where we crossed the creek on to the Southern side when it went across the creek and came out right directly at Fernbrook and then right down again. Only went a little distance, possibly twice the length of this room and went down right into the low ground, again, to the bed of the creek, as we called it, because in high water the water would come up there and leave deposits on the place."

G. W. Buttner, called on behalf of the defendants, testified that he has resided in Alameda County since 1858; that during his youth his father had a ranch at Sunol and that he travelled through the Niles Canyon to Vallejo Mills at the opposite end of the canyon in the year 1862 or 1863, and before the Western Pacific Railroad was constructed. He [fol. 115] further testified that he is familiar with the Niles Canyon and with the wagon road and existing right of way line of the Southern Pacific in said canyon.

"Mr. St. Sure:

Q. Have you a recollection of the road through Niles Canyon prior to the time of the coming of the original Western Pacific Railroad?

A. Yes, sir.

Q. About what time or what year do you recall—withdraw that. Do you remember traveling on that road?

A. I do.

Q. When did you first travel on it if you remember?

A. I came down, we came down, my brother and I with my father, he brought some sacks of wheat down through Niles Canyon, used to come in a little express wagon, to be ground at Vallejo Mills.

Q. And you got on that road at Sunol at the end of the Canyon?

A. Yes, at Sunol.

Q. And Vallejo Mills was at the opposite end?

A. At the opposite end near Niles.

Q. And that is the place where you went to have the grain ground into flour?

A. Yes, sir.

Q. Do you remember what year you first made the trip through the canyon as you have described?

A. Well, I could not say now. It was before the railroad was built, about 1862 or 1863.

[fol. 116] Q. Did you make more than one trip before the coming——

A. (Interrupting.) Yes, every time the folks went down we went along.

Q. About how often was that as you remember?

A. Sometimes of course in the winter not quite so often, but in the summer time quite often.

Q. A couple of times a month or less or often.

A. More than that, maybe once a month.

Q. Were you familiar with the road that went through the canyon at that time?

A. Yes, sir.

Q. Are you familiar with the road as it exists in the canyon today?

A. I am.

Q. And are you also familiar with the line of the right of way of the Southern Pacific Company as it goes through the canyon today?

A. I am.

Q. And also the course of the stream in Niles Canyon, the stream, Alameda Creek?

A. Yes, sir.

Q. You have no doubt seen this map and you understand what this map represents?

A. Yes, sir.

Q. From this point where the red line begins until the point at the other side of the map where the red line ends is the property which is in dispute.

A. Yes, sir.

[fol. 117] Q. On this map the red line represents the existing center line of the existing county road. There is a solid line which represents the center line of the existing railroad right of way and there is a broken line with

figures along it which represents the Southern Pacific engineer's idea of where the old road used to go. Now, with these things in mind would you mind stepping to the map and explaining to the Court your recollection of that old road that you knew and you have been talking about with relation to the existing road?

A. Yes, sir.

Q. Now, you understand that the left hand of the map is Niles and the right hand of the map is Sunol?

A. Yes, sir.

Q. And that the lines on the map are as follows: The red line represents the center line of the road as it exists today, the wagon road as fixed by the survey of Mr. Harrold and these two broken lines represent—the long line with two dots in between longer lines show the outside limits of the four hundred foot right of way claimed by the Southern Pacific Company and this colored line in between those two lines represents the center line of the track of the Southern Pacific Railway Company. You have those things in your mind and have that map straightened out so you can trace on it?

A. Yes, sir.

[fol. 118] Q. (Continuing:) The road as you knew it before the railroad came through the canyon?

A. Yes, sir.

Q. Would you step to the map, Mr. Buttner, and just trace on the map from the point at the beginning of red line nearest Niles, nearest the left hand side of the map, from that point through the canyon to the end of the map or the end of the red line near Sunol?

A. Well, we will start right at the beginning, at Farwell.

Q. Start at Farwell. You fix Farwell on that map at what position?

A. I fix Farwell on that map right in this position here (indicating).

Q. That is just beyond the point upon the map to the right of the legend which shows the second crossing?

A. Yes, sir.

Q. Just to the right of the legend?

A. Yes, sir.

The Court:

Q. You want him to trace the old road as it ran or as it runs today?

Mr. St. Sure: As he recalls the road prior to the railroad being put through the canyon.

Mr. St. Sure:

Q. Yes, your recollection of where the road ran?

A. This old road. Well, the old original road crossing, where it crosses the Southern Pacific tracks at Farwell for a ways was practically along in the same neighborhood as [fol. 119] the existing road until we came to what they called the Stone bridge, that is beyond the big curve here of the Southern Pacific. Well, here is where the present road crosses the creek on the bridge, that bridge there (indicating). Well, we used to go right down, follow right down where that bridge starts from the north side, we just followed right down along—followed where the present railroad is and the bridge in the same direction on the north side of the creek.

Q. Where the change began?

A. Began right there (indicating).

Q. That would be, this is engineer's station 1020 and that is engineer's station 1030. Between the two stations?

A. Between these two stations where they began.

Q. Nearer engineer's station 1020 than 1030?

A. Yes. Then they came right down, just followed the creek right along until we got pretty near opposite where the present Western Pacific large tunnel is on the opposite—well, we crossed the opposite side from that.

Q. Can you fix the approximate position as you recall of the Western Pacific tunnel on that map, the beginning of this change?

A. Yes, the Long crossing?

Q. Yes.

[fol. 120] A. Yes. Well, this Long crossing, we crossed over, we crossed the creek and came out at a point about here to the south side again (indicating).

Q. Would you make a mark for that?

A. Yes, there is about where the Long crossing started from this point here (indicating).

Q. Make another mark at the beginning of that.

The Court: Put a capital B.

Mr. St. Sure:

Q. Make a circle then and we will put a B by it.

A. All right.

Q. B1 is the beginning of the Long crossing, as you remember it and B2, the end of the Long crossing. Then we came to the south side and then we followed on that south side, well, the road was quite close to the Western Pacific as it comes right in this point here and then we went along there I guess for about five hundred yards and then we had to cross back again, from this point we crossed back over the creek to that side. That was quite a long crossing also.

Q. You have made two marks which I will number B3 and B4.

A. Yes. Then we followed right along that line on the north side of the creek until we got practically to where the old road is where we connected here again at Brightside with the new road. There is a bridge across—there [fol. 121] was a bridge across—there was a bridge across and there is another bridge, the bridge is down—that is where the bridge was (indicating).

Q. Place a mark where the old road came back with the new one at the present time.

A. Here is where the old road came back.

Q. Well number that B5.

A. Yes. And from there we run along below the present railroad until we got up—well, in fact, we got to, we strike now the other railroad crossing, over near—well, that is the same as the old road.

Q. As the existing road?

A. Yes. And I think, let me see there was—we had two crossings on the railroad, we had two crossings. Now, what point is this here, is that down where the present Spring Valley dam is connected or is it nearer Sunol?

Q. That I don't know.

A. There is two railroad crossings.

Q. Of course, you understand this red line doesn't go all the way into Sunol?

A. Oh, it does not.

Q. No.

A. Well, this here line then is where we crossed the railroad again about five hundred yards from where the Spring Valley dam is.

Q. Did the old road correspond?

A. Yes, the old road practically followed clear into Sunol.

[fol. 122] Q. Now, then, your testimony, if I may get the effect of it is that the old road at this point between Engineer's stations 1030 and 1020 as shown on this map ran a different course from the present existing road?

A. Yes, on the opposite side of the creek.

Q. The existing road runs a different course from the old road, from this point to the point which you have marked B5?

A. Yes, sir.

Q. And in all other respects it ran practically the same as the existing road? Is that a correct statement of your testimony?

Mr. Thunen: I object to that as leading and suggestive and not in line with the witness' testimony?

Mr. St. Sure: I think the testimony is clear enough.

The Court: I will allow it. I don't see that it is leading or suggestive. I will allow the testimony to stand.

Mr. St. Sure:

Q. Is that the correct testimony of your recollection of the road as it existed in relation to the road as it exists today?

A. Yes, sir.

Q. Have you traveled over that road at intervals, continuously since the early sixties. Over the road through Niles Canyon?

A. Yes, sir.

Q. Except for the change that you have pointed out upon [fol. 123] the map, that is the change in the course of the road between engineer's stations 1020 and 1030, the points you have marked as B5, except for that change has the road remained substantially the same, in practically the same position since the early days?

A. Yes. Well, there might be a few changes, not over fifteen or twenty or thirty feet to my knowledge.

The Court: What is the number of the second station?

Mr. St. Sure: The second place pointed out on the map is B5 with a circle. Have you finished your answer? Read the answer as far is it went, Mr. Reporter.

(Answer read.)

A. Might have been straightened out, there might have been places where it was straightened out a little.

Q. To your knowledge or in your recollection, Mr. Buttner, was there a road at any time through Niles Canyon or rather a road across Niles Canyon that ran over the ridges of the hill to the north of the creek?

A. No, there was not.

Q. The only road that you recall is the road that you have testified that you traveled along and the course that you have described on the map?

A. Yes, sir.

Q. Which corresponds in part to where you have testified to where the road exists today?

A. Yes, sir.

[fol. 124] Q. That road has been continuously open?

A. Yes, with the exception of sometimes in the winter time when we had floods and could not very well cross it, but in the summer time they were dry and kept it open so they could go through with light rigs, used to go to the Mills down there.

Cross-examination:

Q. You are not prepared to say that the old road did follow the exact line of the present road for any distance, are you?

A. For any distance?

Q. Yes.

A. Oh, it did for some distance.

Q. How do you determine that it is exactly the same as it was?

A. How do I determine it is exactly the same as it was?

Mr. Thunen:

Q. Yes. How do you determine that the line of the road at any point is in exactly the same position as it was in these early days of which you speak?

A. Well, it was on account of the old original road, I say certain points was followed just about in the same line as it is today with the exception we had to make this creek crossing and when they made that change in 1910 we came over the little tunnel and around and over the big tunnel and then crossed the bridge just on the other side of Brightside and came into the original traveled road again.

[fol. 125] Redirect examination.

Mr. St. Sure:

Q. Between the time you made this first trip, as you recall, and to the present time, you have lived continuously in Sunol?

A. Most of the time.

Q. During a long period have you been away at any one time.

A. Not more than about seven or eight years.

Q. And except for that time that you were away you have been familiar with this road and traveled on it?

A. The present road?

Q. The road through the canyon?

A. Yes, I have.

Q. And is it upon that basis and upon that knowledge that you have based your testimony.

A. Yes, sir.

Q. And upon the fact that you have traveled on that road continuously except for this period that you state you were away, since the early sixties?

A. Yes, I was an inspector when they built the new road in 1910.

Q. When they built the new road in 1910?

A. Yes.

Q. By that new road you mean the point of change there between engineer's stations 1020 and 1030?

A. Yes, sir.

Q. Along the canyon until it came to the point B5 marked on the map?

A. Yes, sir.

Q. And that change was made when?

[fol. 126] A. Somewhere in 1910, I think.

Q. And you have been familiar with the road since 1910, have you?

A. Yes, sir.

Q. As it exists today practically as shown upon that map?

A. Shall I answer?

Q. Yes.

A. Yes."

FRANK L. KING, called on behalf of defendants, testified that he was born in the Niles Canyon in 1872 and that he was familiar with the Niles Canyon and the existing wagon road therein, and that he served in the capacity of road foreman for the County of Alameda from the years 1912 to 1920. He further testified that he had been familiar with the course of the wagon road through the Niles Canyon since the year 1879.

"Mr. St. Sure:

Q. Do you understand the map that appears on the wall there, Mr. King. This right hand side represents the direction of Sunol and the other end of the map, the left hand end of the map represents Niles and Vallejo Mills is shown at that end. The directions upon the map, the arrow points to the north. The red line upon the map shows the surveyed line and the traverse of the traveled road as it now exists in the canyon. The other lines represent the four hundred foot strip of right of way claimed by the Southern [fol. 127] Pacific, is shown by a long line and the two shorter lines, the solid line between those two lines being the center line of the railroad right of way. Now the map represents or purports to represent the canyon through the hills known as Niles Canyon. The creek is also shown.

A. From the point of Stoney Brook, Farwell.

Q. From the point of Stoney Brook or Farwell.

A. You want me to trace the original road as I remember it in 1870.

Q. What we want you to do is to tell how the old road ran with reference to the present highway which is shown on the map by a red line.

A. The old road ran from Stoney Brook to this point at the stone bridge over the present highway—ran from Stoney Brook to the Stone bridge over the old original Niles Canyon road to that point, at the point of the stone bridge and the new road is on the south side of the creek for a distance.

Q. Where about, is the old road?

A. The old road from the Stone bridge where you know the highway leaves it now. The old road at the stone bridge left that point and followed close to the railroad, that is, close to the foot of the fill around the line between Section 11 and Section 12, where there was a ford. Here is the [fol. 128] railroad. It followed around a point about section 11 where there was a creek crossing, a long ford, following that, would be in the neighborhood of about between sections 11 and 12 and then it followed the railroad on the creek side to a point at Brightside. Now, the new highway is on the opposite side of the creek to this point at Brightside.

Q. And that road you said followed, the highway followed the railroad along there on the creek side, and the railroad was on the north side of the creek?

A. Yes, on the north side of the creek.

Q. Was on the north side?

A. Was on the north side.

Q. And you say it has been changed, the highway, to the south side.

A. From a point on the stone bridge to Brightside has been changed to the south side of the creek. Now, from Brightside, following from Brightside down to Sunol, the lines ought to be in here somewhere from Brightside and to Sunol it follows the old Niles Canyon road, the original road.

Mr. St. Sure:

Q. Mr. King, you were employed as a road foreman for the County of Alameda at the time the changes were made between the Stone bridge and Brightside, were you not?

A. Yes, between Stone bridge and Brightside. That was in about, if I remember right, 1910. I did not take the [fol. 129] position of road foreman until 1912, but I was in the canyon during the time.

Q. You were familiar with those changes when they were made and as they were made, is that correct?

A. Yes, sir.

GEORGE A. POSEY, called as a witness on behalf of the defendants, testified that he is the County Surveyor of Alameda County, which position he had filled during the last preceding five years; and that he has been a member of the staff of the County Surveyor from the year 1913 to the time of his own assumption of that office.

Mr. St. Sure:

Q. Mr. Posey, I am going to show you a document which has been admitted in evidence, the original plat of the field notes of survey of road No. 247, dated April 11, 1859. You have seen that before?

A. I have.

Q. And I am going to call your attention to the line upon this map which represents the work of Mr. Harrold, and I am going to call your attention particularly to the broken line which appears upon the legend as road No. 247, and I will ask you whether or not in your opinion as an engineer and surveyor, being given two terminal points fixing such line, that is, a point at Sunol, and a point at Vallejo Mills, [fol. 130] whether a survey line could be run accurately between those two points by merely taking these field notes and plotting the line upon a piece of paper?

A. If certain field notes are taken and considering that the notes—the bearings, for instance, are only to the nearest quarter of a degree, I believe that it would be very difficult to replace the line.

Q. And assuming a further condition that there should be no tie-in points between these two points, that is none of the tie-in points referred to in the field notes should be located, in your opinion would such a survey or such a re-running of the line upon the paper only be accurate in any degree?

Mr. Thunen: I object to that question upon the ground that there is no occasion for assuming anything. The witness has the field notes and the plat. It is leading and sug-

gestive from counsel who is testifying from what the surveyor has before him. It is not for counsel to suggest.

(Discussion.)

Mr. St. Sure: I merely want to draw from this witness whether or not in his opinion that the line which was run as Mr. Harrold testified it was run, merely from field notes and plotted upon a piece of paper, with only two points fixed, whether or not in his opinion as a surveyor and engineer, that would be an accurate representation of the line? [fol. 131] The Court: I will allow you to get his opinion of it. Mr. Harrold didn't state it was accurate. Approximately correct. The witness may answer the question.

A. I believe it would be very difficult to replace a line along in that manner on the ground as the roadway was intended to be in the beginning, being that the bearings are only to the nearest quarter of degree. A surveyor of this day and age would have a very difficult time relocating that roadway.

Mr. St. Sure:

Q. That plat you have in your hand represents or shows the topography of the Canyon in the vicinity of the road as delineated on that plat, doesn't it?

A. Yes, sir.

Q. Taking into consideration the topography shown upon that plat, does the road delineated upon that plat by the engineer, run upon the high points of the Canyon, through the hills on the north side, or does it run in the basis or bottom of the Canyon?

The Court:

Q. You may state whether or not the road indicated by the red line there passes over,—according to the map itself,—if the map means that the road is over the points on the high ground any place.

A. Well, the map is crude. The indication of these lines on the map, this place, these lines on the map would indicate a slope of a hill, it would indicate a hill, this being the [fol. 132] Canyon, and this also indicates a stream that runs down into Vallecitos creek. You will note that the line as plotted here is at the toe of these slopes. Well, there may

be some little portion close to the creek bank where it sloped and came up from the creek, and most of it is at the north side of the creek which would indicate from the map a flat ground, possibly with a slope on toward the creek itself.

Q. The creek bed?

A. The creek bed, yes. That would be because almost every crossing of Vallecitos creek practically down to Vallejo Mills with the exception possibly of a space just east of Vallejo Mills which might be in here (indicating) indicates high land but doesn't indicate any hill beyond. The general evidence to be deducted from the map would indicate that the line of the proposed roadway proposed by this survey ran in the bottom of the canyon or as close thereto as possible. The statement here on the map, itself says, "Plat of field notes of a survey of road from Vallejo Mills up the Alameda to the Stockton road near Bertand Bedon's" which would give the further indication that it meant the road was run in the bottom of the canyon.

Cross-examination:

Witness testified further that he believed, unless all the monuments and points could be identified practically from [fol. 133] course to course, that it would be very difficult for the original man to retrace his line.

Mr. Thunen:

Q. Did you make any effort to check the survey notes yourself with the existing county road?

A. These old survey notes of 247, 247 notes, do you mean?

Q. Anywhere?

A. Just endeavored to do so in the office.

Q. Did you succeed?

A. I could not make them fit.

Q. You did investigate the present existing County road?

A. Yes, I had the notes for the road.

Q. And your efforts were to check the old notes with the new?

A. Yes, and to correspond with previous testimony, but the notes are so loose, I don't believe anyone is capable of doing it.

Defendants offered in evidence as Exhibit D, topographic sheet of the Pleasanton Quadrangle, United States Geological Survey, a copy of which is here inserted.

(Here follows map, side folio 132a)

MAP IS TOO LARGE TO BE FILMED.

Mr. St. Sure:

Q. You are familiar with the Canyon and the roads that exist in the Canyon, are you not, Mr. Posey, in Niles Canyon?

A. I am.

Q. Mr. Posey, you have said heretofore, that you were familiar with the conditions topographical and otherwise, [fol. 134] on the ground through Niles Canyon, and you also are familiar, I presume with——

Q. You are familiar with conditions of the floor or bottom of the Canyon?

A. Yes, sir.

Redirect examination.

Mr. St. Sure:

Q. Mr. Posey, you have had considerable experience in road building, road surveying, and supervision of construction of roads?

A. I have.

Q. Basing your answer upon that experience and upon your knowledge of the Niles Canyon, could a road be constructed on the outside of the right of way lines as claimed by the Southern Pacific through Niles Canyon which would be safe, feasible, or practicable, or any one of these, which would be reasonably safe, reasonably inexpensive, reasonably practicable, and at the same time accommodate the public?

Mr. Thunen: To save the record, if the Court please, we renew our objection upon the ground I have heretofore stated that it is not material or competent for the reason that this is a strip originally granted by Congress for a specific purpose and these questions cannot enter into it, and for the further reason that the question takes into consideration too many factors which the witness cannot [fol. 135] answer, and it puts to the witness an engineering problem which would require a thesis rather than a simple answer. The question is too vague.

The Court: Overruled with that understanding. I recognize the fact that it contained matters that would go more to the weight of the testimony than as to its admissibility or competency. I feel to get a complete and satisfactory an-

swer to that question it would require perhaps some special investigation on the part of the witness, and it has not been shown he ever made such a special investigation, but he has testified that he is familiar with the Canyon, and familiar with surveys through there and topographical conditions. His qualifications as to a Civil Engineer were waived with the beginning of this examination if I remember correctly, so I will overrule the objection.

To which ruling plaintiffs reserve an exception, which is hereby designated as Exception No. 3.

A. Shall I answer?

Q. Yes.

A. Of course, at the present time there are several places where the road is outside of the four hundred foot right of way. In other places, in attempting to construct a road outside of the four hundred foot right of way we probably [fol. 136] would run up against a proposition of steep hillsides that would require very expensive cuts, long slopes, and consequently heavy embankments. The road is located in the bottom or at the foot of the slope in an endeavor to reduce the grade as much as possible. If the relocation was placed on the hillside the grade would be materially increased. As to the length of the roadway it would require the roadway to go back into the various canyons as you come to them instead of following up the face of the defile itself. Undoubtedly the road would be more dangerous because of the high slopes and the tendency for the rock and other material to fall down the road, and the expense would be very much greater than a road constructed at the foot of the slope. I don't know whether I can add anything to that answer or not; in other words, the relocation of that roadway outside of the four hundred foot strip would entail additional expense and additional grade and length of road and would endanger the people traversing the same by reason of the slopes, the tendency of the slopes to cave and rocks fall down.

Q. Summing up these facts, will you state whether it is your opinion that it is practicable and feasible?

A. A road can be built most anywhere regardless of the expense. It would be most practicable to build a road at [fol. 137] the foot of the slope and my answer would be

that it would not be practicable if it can be placed at the foot.

Q. You mean it is possible not feasible?

A. Possible but not feasible.

Mr. St. Sure:

Q. Now, Mr. Posey, you are familiar with the surrounding country outside of the Canyon. Can you give us an estimate of the length of a road that would take the traveling public from Niles to Sunol in the event they could not go through Niles Canyon?

A. The actual mileage?

Q. Yes, an estimate of the mileage.

A. No, I am not able off hand. Anybody going from Niles to Sunol any other way than up the defile or up Alameda creek would either go back to Hayward and over the Dublin pass, around through Dublin and down to Sunol, or by way of what is known as the Stockton Pass road across the Calaveras creek and back to Sunol. The exact mileage I am not——

Q. (Interrupting.) Would it be considerably longer or practically the same?

A. Would be considerably longer.

Q. Would it be as much as twice as long?

A. No, I doubt that. I am not able—I could scale it out on the map.

Q. The existing road through Niles Canyon—it is necessary for people living in the Canyon in order to have ingress [fol. 138] and egress, to use that road, is it not? There is no other road leading out or into the Canyon but the County Road?

A. There is one road that comes in at Farwell from Palomeras.

Q. That is at the edge of the disputed——

A. (Interrupting.) It is at the edge of the disputed territory. The nearest roadway would be by the Niles to the Stockton Pass road, over what is known as the Mission Pass back into Sunol. As far as I can scale it on this map the roadway from Niles to Sunol by way of the Niles Canyon would be in the neighborhood of six and one-tenth miles, while by the Mission Pass it would be nine and five-tenths miles. Practically fifty per cent more in length.

Q. The Mission Pass is the same as the Stockton Pass?
A. Yes, it is called the Stockton Pass road but it goes through——
Q. (Interrupting.) Nine and what?
A. Nine and five-tenths, nine and a half miles roughly scaled.
Q. Practically fifty per cent longer?
A. Fifty per cent longer.

Mr. St. Sure:

Q. Now, taking in the full length of the Canyon, suppose this road which is represented by the red line on Plaintiff's Exhibit 6 should be shut off where the red line begins and [fol. 139] ends, would it be possible at any other place upon the base of the Canyon to route a road outside of the four hundred foot strip right of way, that is, for the entire distance, so as to connect the two ends again.

Mr. Thunen: I object to that as calling for the conclusion of the witness. No foundation laid.
The Court: Objection overruled.

To this ruling plaintiffs reserve an exception, which is hereby designated as Exception No. 4.

A. As I stated in my other answer it would be possible to construct a road outside of the four hundred foot right of way.

Mr. St. Sure:

Q. At the base of the Canyon?
A. Not at the base of the Canyon. It would be either on the hillside, on the slope of the hill, or on the top. It would not be feasible for people on the south side to use a road that would be located on the north side and therefore probably would have to have two roads to allow people on both sides to go out.

The Court:

Q. As I understand you, it wouldn't be possible at all to put a road in the base of the Canyon, in the defile outside of the two hundred foot right of way other than the one that is now for the full length?

[fol. 140] A. Not the full length. There are certain places where you could do that, but not adjoining the four hundred foot right of way. Places up the defile possibly. There are places where it is entirely out.

Mr. St. Sure:

Q. Could you at this time, Mr. Posey—I realize it is perhaps taking unfair advantage of you—estimate with any degree of accuracy the cost of such a road as you have just described through the Canyon, a road similar to the one which now exists, that is a gravel road?

Mr. Thunen: We object to that question upon the ground that no foundation is laid. It has not been shown that this witness has made any actual investigation upon the ground.

Mr. St. Sure: I am asking him if he knows.

Mr. Thunen: That would be his conclusion.

Mr. St. Sure: Mr. Posey has stated that he has constructed roads and made surveys and is familiar with the contour of the Canyon itself.

The Court: They offer the foundation based upon his qualifications.

Mr. Thunen: I am not objecting to the qualifications. No man can say what it would cost.

The Court: Let him answer the question.

[fol. 141] The objection was overruled, and plaintiffs reserve an exception hereby designated as Exception No. 5.

A. The question is rather a hard one. It would be a conclusion there is no doubt about that. We would have to assume, however, that the construction in this particular country would be the same, the very same construction of grade and road, along the same proposition we have now in the construction of the Sky Line Boulevard. That would cost together with the culvert, etc. for a road on one side of the canyon, not considering any crossings or bridges in the neighborhood of twenty-five or thirty thousand dollars a mile on those slopes. Looking at the map I would assume that there is nearly four miles of rough roadway and the closest you could get it would be—would cost a hundred to a hundred and twenty-five thousand dollars to make a gravel roadway.

Mr. St. Sure:

Q. Exclusive of bridges and crossings?
A. Yes, sir.

Recross-examination.

Mr. Thunen:

Q. As a matter of fact, some fourteen years ago you did reconstruct the old road, didn't you?
A. In the bottom of the canyon?
Q. Yes, for a considerable distance, that is, outside of the railroad right of way site?
[fol. 142] A. Yes, sir.
Q. It is outside of the right of way at the point of the so called Mayberg curve?
A. That I could not say; I am not familiar with the curve. I believe that curve has been referred to as the Mayberg curve.
Q. Now, then, Mr. Posey, wouldn't it be possible to approach this Canyon on the southerly side of the creek instead of the northerly side?
A. From where, approached from where?
Q. From the end of the map here, we will say the westerly end of the map, the westerly end of the red line?
A. It is possible if the road is constructed above your track, you mean keep out of the four hundred foot of right of way?
Q. Yes.
A. The old road. There is a piece of the old road right along here to the north of your track that was shifted later to the side, over here, outside of your right of way, in order to get above your track in here. But it could be put on the top of the hills or if you put in a road on the other steep hillside at this particular point—here is your own bridge at Farwell.
Q. Now, then, assuming you cross—you come right down to the creek, right at the easterly end of the crossing, do you not?
A. Right in the creek.
[fol. 143] Q. Is there a slope on the southerly side as well as on the northerly side?
A. Yes sir.

Q. Couldn't you follow the base of the slope of the creek and across at the bottom of the slope from side to side; in other words, the hill slopes on either side of the creek, does it not?

A. Yes, sir.

Q. Isn't it possible and feasible to follow the southerly edge of the creek instead of the northerly edge?

A. It is possible but not feasible, because this slope, this side is very steep, and it would mean a proposition of cutting into the road, here, into steep hillside. This roadway from what is known as the stone bridge to this point outside of your right of way is in the bottom of the creek, and it would necessitate the putting up of a retaining wall on one side of the base of the hill and filling in with gravel over the creek. It is virtually in the bottom of the creek now.

Q. Now, you are right here and over this map, it travels for a distance of perhaps two miles or a mile and a half in sections 11, 14, 13, and 12, is that not a fact?

A. Yes, sir.

Q. Now, then, coming down to the point where you again enter the right of way in section 12, Township 4 south, Range 1 west, is it not feasible to continue on the southerly side instead of crossing the creek?

[fol. 144] A. At Brightside?

Q. At Brightside.

A. It is possible but the other alignment is much more feasible.

Q. The hills are not so rugged, the slope not so abrupt and steep?

A. The hills are further back but in order to get back over to Sunol it would take a very long expensive bridge to get back to Sunol and would entail a crossing of the Western Pacific.

Q. As a matter of fact, the Western Pacific is on that side, is it not? It hasn't many bridges.

A. It has a bridge across the creek to Sunol.

Q. And the only bridge you need now is the bridge in here, don't you?

Mr. St. Sure: I object to that as irrelevant, incompetent and immaterial.

The Court: Objection sustained.

To this ruling plaintiffs reserve an exception hereby designated as Exception No. 6.

Mr. Thunen:

Q. Is there a bridge across the creek there at the present time?

A. A temporary bridge.

Mr. Thunen:

Q. Is it the intention of the county to build a permanent bridge?

A. If they own the right of way.

[fol. 145] Mr. St. Sure: I stipulate we need a new bridge.

Mr. Thunen:

Q. Do I understand you correctly that it would be feasible to extend your road from the point where you now cross, the temporary bridge, it would be feasible to extend it, or keep outside of the railroad right of way?

A. I believe it would be possible as I stated before, but not feasible because it would entail grade separation between the County road and the Western Pacific, in order to get a road in through there and at the same time it would entail also the construction of an entirely new bridge to get back to Sunol at the easterly end of the road. Where it is now at this particular side there appears an abutment left of that bridge and would only need to be, to be spanned, would only need spans.

Q. I am not asking for a comparison of expense, whether one road or the other is chosen, but whether from the standpoint of expense of engineering it would be practicable to build that road, to continue it on, say the southerly side of the creek at least on the southerly side of the railroad right of way?

A. From an engineering viewpoint I would say possible but not feasible and I would not report for it.

Q. Will you state what grounds of feasibility are lack-
[fol. 146] ing, leaving out of consideration that it is cheaper on the site of the railroad right of way?

A. That is one of the primary considerations, is the expense of any road.

Q. Any road costs money to build?

A. I say the primary proposition in building any road is the expense.

The Court:

Q. You want to get certain results with the least money possible?

A. Yes, sir.

Mr. Thunen:

Q. Then, you base your answer primarily on the difference of cost between maintaining the road where it is and making a new grade?

A. To construct a new one.

Q. Construct a new road?

A. The maintenance of a new road located on the south side would be far more expensive than on the north side. On the south side, as I stated before, we would probably be involved with deep canyons and increased length of roadway, heavy cuts and consequently heavy fills, and an entirely new bridge, probably a high level bridge that would be much longer than the one at Brightside.

Q. Are there a great many creeks coming in from the laterals of Alameda Creek easterly?

A. You mean creeks or Canyons.

Q. Creeks or canyons, either one?

A. There are quite a number of canyons going up the south side, that is, goes in and makes indentations of what [fol. 147] would otherwise be a smooth floor of the canyon. The higher you go, the further away from the creek you go, consequently your alignment is increased, and the steep hillsides involve heavy exacavations which takes years to settle, and consequently the maintenance of such a line would be much more than the present line.

Q. I show you the geological sheet, call your attention to the geological sheet that has been offered in evidence by the defendant, and particularly to the lack of contours shown beyond the point, opposite Brightside and the Sunol neighborhood.

A. Lack of contours?

Q. Yes. Doesn't that show substantially an even elevation unbroken by lateral canyons?

A. The contours as shown here are fifty feet contours. In other words, they are fifty feet apart in vertical elevations.

Q. That is largely a wide area?

A. That is quite a wide area and would seem to indicate that there is some flat land. That is true in and around Brightside and in the bottom of the canyon. If you will notice on the side there are many indentations of the hills which would force the roadway higher and would increase the length of the road and would also involve a grade crossing over the Western Pacific, the present Western Pacific.

[fol. 148] Mr. Thunen:

Q. As a matter of fact, you maintain how many grade crossings on the Southern Pacific line?

A. Two at the present time.

Q. Two. In that particular place. There is one at Farwell.

A. One at Farwell and two others. Two others near Sunol.

Q. Yes, these are only shown here, one is—one of them is shown on the map.

A. And you would have—we only have one crossing with the Western Pacific and if you build on that side we would have two.

Q. Have two with the Western Pacific?

A. One to cross to the south side and one to cross back to Sunol.

Redirect examination.

Mr. St. Sure:

Q. The Western Pacific railroad right of way is on the south side of the Canyon, isn't it, Mr. Posey?

A. Yes, sir.

Q. Now, in the event that this road on the south side should be built as you have stated that is is possible but not feasible, I believe you testified that it would not be available for use by the people living on the north side of the Canyon.

A. Not at all times, without bridges or some method of crossing the creek.

Mr. St. Sure:

Q. Then, that is another additional item of expense that [fol. 149] would enter into the construction of a road built through the Canyon, in your opinion, is that correct?

A. Yes.

Mr. St. Sure:

Q. Now, I think, Mr. Posey, you testified as to this, but I would like to be permitted to ask the question. You stated, Mr. Posey, that the element of expense had a great deal to do with determining the feasibility of a road. Would you state whether or not the element of safety also enters into the conclusion as to the feasibility of two roads, two given roads, for the construction of a road.

Mr. Thunen: We object to that as leading and suggestive.

The Court: I don't see that it is leading. It does not suggest the answer.

The objection was overruled, and plaintiffs reserve an exception hereby designated Exception No. 7.

A. I would say that the matter of safety is a very large factor in the location of a road.

Mr. St. Sure:

Q. As between the existing road through Niles Canyon and a road upon the side of the hill or on a slope outside of the four hundred foot right of way, would you state whether or not in your opinion one road would be more or less safer than the other?

A. The present road through the Canyon has been there a number of years and the slope has vegetation growing on [fol. 150] the side which has a tendency to keep the soil in place along the upper slopes. If a new road is built through there it may take ten years or more before the slopes become suitable, and consequently you will have slides on account of the slopes and also the rains and other débris dropping down onto the roadway and endangering passing vehicles and people.

Recross-examination.

Mr. Thunen:

Q. Do you know how close the highway approaches to the railroad track at its nearest point?

A. Not in here but at Farwell it is very close, near Farwell, this place right here (indicating).

Q. It crosses there?

A. It crosses and it really parallels the railroad track very closely.

Q. That is a dangerous element too, is it not?

A. A grade crossing?

The Court:

Q. No the proximity of the highway to the railroad track?

A. Not at that particular place except at the crossing, because the road is below the grade of the railroad at that particular place.

Redirect examination:

Mr. St. Sure: I have a few further questions I want to ask Mr. Posey concerning expenditures that have been [fol. 151] made under the theory of estoppel as appears in our answer in the fourth defense, our theory in this connection being that considerable sums of money have been spent by the county not only in the construction but the maintenance of the right of way.

The Court: I have read it.

Mr. St. Sure:

Q. In this connection, I will ask you, Mr. Posey, whether or not you are familiar with expenditures made by the County in the maintenance of the County road through Niles Canyon, are you familiar with those expenditures that have been made by the county?

A. I am familiar with some of the expenditures made on contracts.

Q. You have made an investigation of the records of the Board of Supervisors and have procured certain figures from those records?

A. I have.

Q. Pertaining to contract work done on the road, is that correct?

A. Yes, sir.

Q. And you have a list of a number of those contracts and the expenditures, have you not?

A. I have.

Q. Would you state the total amount of expenditures as revealed by those figures?

Mr. Thunen: One moment, I object to that, if the Court pleases, upon the ground that it is not material. There is no estoppel pleaded and no estoppel will lie under law. I [fol. 152] don't know where the witness gets his figures, but it is not the best evidence. He is assumed to copy them from the records, but there would be no objection made upon the ground that they are not the best evidence.

The Court: Objection overruled, because I think the estoppel is pleaded in the fourth separate defense.

Mr. Thunen: It is not. I believe it merely says that they have that highway and that the roads are necessary for public accommodation.

Mr. St. Sure: On page 12 it states that the defendant (reading) "has expended great sums of money for the establishment, operation and maintenance of said road and highway and roads and highways over said land and every part thereof, which said expenditures by said County of Alameda have extended over a long period of years as aforesaid, and said defendants further allege that all of the acts and things above mentioned in this fourth defense were and are done and continued with the full knowledge of and without any objection by or on behalf of the plaintiff herein." Namely, there was no objection to the possession, operation and maintenance of a road for a long period of years entailing a considerable amount of money.

Mr. Thunen: I have overlooked the defense on that par- [fol. 153] ticular ground, they have pleaded it and apparently it is not a good ground, the ground is not good.

The Court: As to whether the question of estoppel would lie in this case or whether any such defense could be interposed or whether any fact in the defense could be made or not, it is all involved in that ground, but I will overrule

it only on that ground. I would have sustained the objection as to the best evidence.

Mr. Thunen: The effect.

The Court:

Q. You have made this investigation yourself now, and have the figures and are they accurate from the records?

A. These have been taken from the actual payments as made by the County Surveyors of it, or from the Supervisors for payments of money on these particular contracts.

Q. And so far as you know those figures are correct?

A. Yes, sir.

Q. Correct excerpts from the record?

A. Yes.

Mr. St. Sure:

Q. And on the basis of these estimates the payments are made; in other words, the payments are based on this, the actual payment of money?

A. Yes.

To this ruling plaintiffs reserve an exception designated as Exception No. 8.

[fol. 154] The Court: You may state.

A. The total amount of money paid on these estimates for the various contracts in Niles Canyon roads beginning in November, 1906, to March, 1925, amounts to $114,692.34.

Mr. St. Sure:

Q. Now, just read off for the purpose of having these items into the record, the amount that you refer to, read off that list in the manner that you have stated.

A. On November, 1906, repair of bridge one-half mile east of Farwell, $5,000. January, 1910, constructing portion of roadway, No. 4974, $3900. April 10, repair of bridge at Farwell, $2,474. August 10, bridge at Brightside, $8,873. September 10, curtain wall at Farwell, $1,438. August 11th, small bridge and retaining wall at Brightside, $3,714.45. August 11th, small bridge and retaining walls above Farwell, $4,979. August 11th, curtain

wall at Farwell, $2,525. August 12th, widening Niles Canyon road, which was County No. 4974, $47,856.26. July 14th, retaining wall and slope walls, grading County road No. 4974, $31,986.10. March, 1925, repairs to the bridge at Brightside, $1,946.53. Total, $114,692.34.

Q. Now in addition to these expenditures made under contract has any additional money been expended in the maintenance or repair of the Niles Canyon road within the boundaries of this disputed area to your knowledge?

[fol. 155] Mr. Thunen: We object to that question as going into the expenses of maintenance and repair. That would be no ground of estoppel in any event.

The objection was overruled, and plaintiffs reserve an exception designated as Exception No. 9.

A. There has been money expended for graveling and maintenance, sprinkling, small culvert work on that portion from year to year by the road masters from the road district funds.

Mr. St. Sure:

Q. That is, aside from the total that you gave, in addition to the totals you have given, these expenditures that you have testified to that extended over the period from 1906 to 1925?

A. Yes, sir.

Q. These figures you have given and have testified to, Mr. Posey, do not include the original cost of establishing that road, do they?

A. No, this is since 1906.

Recross-examination:

On recross-examination Mr. Posey testified that the figures given included all expenditures on that portion of road No. 4974 indicated by the red line on the map between the two termini of Mr. Harrold's survey as shown on plaintiffs' Exhibit No. 6.

[fol. 156] Q. Now road 4974 differs from the line that existed before 4974 was adopted, does it not, in part?

A. In part. It is supposed to include as much of 247 as was feasible to use.

Q. How do you know that any of that previous road was part of 247?

A. The only way I can locate 247 is by the old position of the road as it existed previous to 4974.

Q. How do you know that that was road 247?

A. I must assume that that was county road 247.

Q. You just assume that, you didn't check it on the ground with the survey and actually establish that?

A. No, we never have run out 247.

Redirect examination.

Mr. St. Sure:

Q. Within the limits of the four hundred foot strip claimed by the Southern Pacific Company and between the two termini as shown upon that map, the termini of the red line, can you state where County road No. 4974 deviated from the old alignment of the road that existed prior to the establishment of that road?

A. Well, in some cases but not in all cases.

Q. Point out—I think you have been over that once, but point it out just where this is?

[fol. 157] A. The only particular one I have in mind where the old road still exists, you can see this old road as it went from the north side of Brightside, the so-called Brightside bridge on the north side of the creek to the west within four hundred feet of the strip of the railroad right of way.

Q. That is this point from R5 to the Brightside bridge around this curve; is that correct, up to this point?

A. Not all the way.

Q. Point out the portion that was changed, please?

A. The property would extend in general from the point R5 to R4.

Q. And the change—from that distance was changed back, the road, from within the right of way here claimed to without it, was it not?

A. It was.

Q. Within the four hundred foot right of way strip as claimed by the Southern Pacific Company and shown on that map, can you point out, as of your own knowledge, any change in the course of the old road to the present location of the road as shown by the red line?

A. None except that particular one.

Q. I take it by that answer there are none you can point out of your own knowledge that is within the four hundred foot strip?

[fol. 158] A. Not to my own knowledge. I know there is below.

Q. Outside of the disputed area?

A. Outside of the disputed area.

Defendants offered in evidence as "Exhibit BB" documents on file with the Clerk of the Board of Supervisors of Alameda County, which included the following: Petition, Report of Viewers and Resolution abandoning a portion of County road No. 247.

DEFENDANT'S EXHIBIT "BB"

"To the Honorable the Board of Supervisors of the County of Alameda, State of California.

GENTLEMEN: We, the undersigned, your petitioners respectfully represent and show:

First. That each and all of the persons whose names are signed to this petition are freeholders of Niles Road District, in Washington Township, and Vallecitos Road District, in Pleasanton Township, County of Alameda, State of California, and taxable therein for road purposes.

Second. That we desire your Honorable Body to abandon in said road districts all that portion of County Road No. [fol. 159] 247, 50 feet more or less in width, described as follows, to-wit: Beginning on said County Road No. 247 at Station 1 and following the line of said County Road No. 247 to Station 57 thereof, Being in the Townships of Washington and Pleasanton, County of Alameda, State of California.

Third. That the names of the owners of the land over which the portion of said County Road No. 247 to be abandoned passes are as follows, to-wit: The County of Alameda.

Wherefore your petitioners pray that your Honorable Body will receive this petition and appoint viewers and take such other steps as may be necessary to abandon said portion of said County Road No. 247 as a public highway.

Edward A. Ellsworth, Chas. Evans, Antone C. Garcia, J. C. Shinn, James Rose, M. B. Sneden, M. H. Tyson, Thos. J. Murphy, J. D. Lynch, W. J. Hughes, John Andrews, G. G. Bayley, H. J. McDermott, Wm. Day, F. B. Freeman, M. D., L. J. Ager, J. A. Silva, M. D. Asouge, John Trimingham, R. Watkins.

[fol. 160] (The following indorsement appears on this document:) "Petition for Abandoning County Road No. 247. (Stamped:) Filed Sept. 12, 1910. John P. Cook, County Clerk, by H. Mulvilson, Deputy Clerk."

STATE OF CALIFORNIA,
County of Alameda, ss:

I, John P. Cook, County Clerk of said County, and ex-officio Clerk of the Board of Supervisors in and for said County, State of California, hereby certify that at a meeting of said Board, held on Sept. 12, 1910, a petition was presented by Edw. A. Ellsworth and others of Niles and Vallecitos Road Districts in Washington and Pleasanton Townships of said County, for abandonment of a public road 50 feet wide throughout its entire length; and the center line of said proposed public road is described as follows, to-wit:

Commencing (See Petition) (Road #247, portion of.)

And I further certify that the said petition was received and the accompanying bond approved and P. A. Haviland, County Surveyor, C. B. Overacker and J. T. Foute were [fol. 161] duly appointed viewers, with instructions to view, locate and survey the said proposed road, and a report thereof render to the Board of Supervisors of said County at their earliest convenience.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Board of Supervisors of Alameda County, at the city of Oakland, this 13th day of September, 1910.

John P. Cook, Clerk, by H. M. Wilson, Deputy Clerk.
(County Seal.)

STATE OF CALIFORNIA,
County of Alameda, ss:

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, and that I will truly and impartially perform the duties of a Road Viewer in viewing out and surveying the proposed road described in the petition hereinbefore referred to and a true report thereof render to the Board of Supervisors as soon as practicable.

P. A. Haviland, J. T. Foute, Chas. B. Overacker.

[fol. 162] Subscribed and sworn to, as to P. A. Haviland, before me this 20 day of Feb., 1911. H. M. Wilson, Deputy County Clerk.

Subscribed and sworn to, as to J. T. Foute and Chas. Overacker, before me this 20 day of Feb., 1911. H. M. Wilson, Deputy County Clerk.

(The following indorsement appears on this document:) "Road Survey, abandonment of portion of Road No. 247. Washington and Pleasanton Tps., Alameda County. Order for Survey and Oath of Viewers. Filed March 6, 1911. John P. Cook, County Clerk, by H. M. Wilson, Deputy Clerk.

To the Honorable the Board of Supervisors of the County of Alameda, State of California.

GENTLEMEN: We, the Viewers, appointed by an order of your Honorable Body to view and survey the proposed abandonment of a portion of County Road No. 247, 50 feet, more or less, in width, said road to be abandoned from Station 1 to 57 thereof and being in the Townships of Washington and Pleasanton, Alameda County, California, [fol. 163] as petitioned for by Edw. A. Ellsworth, et al., on September the 10th, 1910, report as follows, to-wit:

That we are disinterested citizens of Alameda County and are not petitioners on the above mentioned petition, and that we have been sworn to discharge our duties faithfully as said viewers.

That we have viewed and surveyed the route of the proposed abandonment and have notified the owners of the property adjacent to the proposed abandonment.

That the road to be abandoned passes over the lands of the County of Alameda, insofar as the title for road purposes extends.

That all of the property owners adjacent to said proposed abandonment consent to said abandonment.

That it is proposed to substitute for the portion of said road to be abandoned, a new County Road. The deeds for said new County Road having been presented to your Honorable Body and which said new road will answer all the purposes of the present road and afford a more direct and practical route.

We submit the following survey of the route and termini of said portion of said County Road No. 247 proposed to be abandoned.

Beginning on said County Road No. 247 at Station 6 thereof and following the line of said County Road No. [fol. 164] 247 in a general Southwesterly direction to Station 57 thereof excepting therefrom such portions as lie within the lines of County Road No. 4974 being in Niles Road District, in Washington Township and in Vallecitos Road District, in Pleasanton Township, Alameda County, California.

We find that the cost of the abandonment of the said portion of County Road No. 247 will be nominal and that said abandonment will necessitate the substitution of County Road No. 4974 hereinbefore referred to.

And we recommend that upon the completion of the passing of the deeds for said County Road No. 4974 and upon the adoption of a resolution establishing a public road upon the lines, as stated in said County Road Survey No. 4974, that the prayer of the petitioners, in the matter of the abandonment of the herein described portion of County Road No. 247, be granted.

Respectfully submitted.

P. A. Haviland, Viewer. Chas. P. Overacker, Viewers. J. T. Foute, Viewers.

[fol. 165] (The following indorsement appears on this document:) "Viewers' Report. Abandonment of County Road No. 247, Alameda County. Filed Mar. 6, 1911. John P. Cook, County Clerk, by H. M. Wilson, Deputy Clerk.

Whereas, on September 12th, 1910, Edw. A. Ellsworth, et al, did petition this Board of Supervisors of the County of

Alameda to abandon a portion of County Road No. 247, and

Whereas, this Board having duly considered said petition did appoint three viewers to view and survey said proposed abandonment and report to this Board, and

Whereas, said viewers did on the 6th day of Mar. 1911, render a report in writing, which report is entitled "Report of Viewers on Proposed Abandonment of a Portion of County Road No. 247", and which report is on file in the office of the clerk of this Board, and

Whereas, said report of viewers did recommend that the prayer of the petitioners be granted on certain conditions in said report being fulfilled, that is the acceptance of the County Road No. 4974, and

Whereas, said County Road No. 4974 has been duly established as a public highway and County Road,

[fol. 166] Now, therefore, be it resolved, by the Board of Supervisors of the County of Alameda that the said report of viewers be and the same is hereby approved and adopted, and

Be it further resolved, that the portion of said County Road No. 247, described in said report to viewers, to-wit:

Beginning on said County Road No. 247 at Station 6 thereof and following the line of said County Road 247 in a general southwesterly direction to station 57 thereof excepting therefrom such portions as lie within the lines of County Road 4974 being in Niles Road District, in Washington Township and in Vallecitos Road District, in Pleasanton Township, Alameda County, California, be and the same is hereby declared to be abandoned as a public highway and County Road of the County of Alameda, State of California.

(The following indorsement appears on the back of this document:) Resolution abandoning portion of County Road No. 247. Filed Mar. 27, 1911. John P. Cook, County Clerk, by H. M. Wilson, Deputy Clerk.

[fol. 167]

Rebuttal

In rebuttal plaintiffs offered in evidence the original files of the Board of Supervisors of Alameda County in the mat-

ter of the petition for County Road No. 689, which files were received as

PLAINTIFF'S EXHIBIT 18,

the petition being in words following:

To the Hon. Board of Supervisors of the County of Alameda:

The undersigned citizens of Washington and Murray Township residing in the vicinity and on the road from Vallejo Mills to Bartrans in Sunol Valley, would respectfully represent to your Hon. Body that a relocation of said road is essentially necessary. Commencing at a point a little east of where the present road crosses the Alameda Creek; thence running south of parallel with the present location and near the same to connect with the present survey at or near C. C. Scotts. If a road was made upon the present surveyed route it would be destroyed by the first rise of the creek. Whereas, if said road re-location be made the road would be upon good ground and not subject to be destroyed [fol. 168] by high water as at present as your petitioners will ever pray, etc.

S. D. Warren, S. Heyer, Thos. Scott, Sam'l I. Marston, James Henson, George W. Jordan, William Incell, Charles Bern, Wm. Bafter, T. Hanna, Jr., M. S. Poesson, Tgnas Schleim, T. Milton, Wm. A. Jordan, H. C. Smith, H. H. Crankhite, M. P. Buckley, J. R. Waves, Isaac Scott, Wm. Snyder, O. C. Simms, O. T. Stankey, J. B. Walton, L. Schojdt, Henry J. Smith, I. B. Irand, Jno. Bollengee, Maquin King, Charles Boerse, Aaron Neir, H. T. Crankhite, H. W. Nuttman, E. Ballengee, James Yeodall, Marshall Higgins, E. Cearly, John R. Martin, S. F. Brown, Henry Hahn, G. W. Manuol, John Richman, J. H. Cole, S. T. Bonner, M. Luders, Jerry Ziegenfasse, S. Taylor, C. B. Gueloeenne, J. C. Norcross, N. L. Hastings.

Personally appeared D. D. Henion, the party over whose land the road petitioned for within will pass, and waives no- [fol. 169] tice required by law, and consents that said road be located as prayed for, and waives all claims for damages.

D. D. Henion.

(The following endorsement appears on this document:) To the Hon. Board of Supervisors of Alameda County. 689. Petition for a Public Road in Washington T. Filed June 19, 1865. G. E. Smith, Deputy Clk. Ordered surveyed and report at next meeting this 19th day of June, 1865. Yours, &c., G. E. Smith, Depy. Clk.

As a portion of said plaintiff's "Exhibit 18" the County Surveyor's report upon the foregoing petition was received and is in words and figures as follows:

"Plaintiff's Exhibit 18 in Evidence

No. 689

C. P. R. R. Co. et al.

vs.

Alameda Co.

To the Honorable the Board of Supervisors of Alameda County.

Gentlemen: In compliance with your order, I have surveyed and herewith return plat and field notes of a proposed [fol. 170] alteration of the west part of the road through Alameda Creek cañon, in Washington Township.

The plat indicates the principal difficulties of the route, which runs most of the way, over table land above ordinary high water; except at the Creek crossings, which present nearly the same facilities for fording as heretofore.

The land taken is of poor quality for cultivation except through Capt. Scotts.

The quantities taken for a three rod road would be as follows, viz:

0.90 Acres of the Mill property,
2.54 Acres of D. D. Henion,
2.64 Acres of Capt. Scott,
.52 Acres of creek bottom—last crossing,
.15 Acres of J. G. Clarke,

for all of which an equivalent will be rendered by vacating the old road. All of which is respectfully submitted.

T. O. Hopkins, Co'y Svr., Alameda Co'y.

Marginal Note: 8/7. 65. Pl'f's Ex. 18.

[fol. 171] H. F. HARROLD, recalled by plaintiffs in rebuttal, testified:

Q. Mr. Harrold, have you ever in your investigation of this Niles Canyon situation considered whether it would be practicable to reconstruct the County Highway outside of the railroad right of way?

A. I have, in a general way.

Q. Have you considered that general question of the road encroachment there over any great period of time?

A. In making this whole investigation we had in mind whether a road could be located at some other point in the canyon other than its present position.

Mr. Thunen:

Q. Have you had experience in location of roads?

A. Wagon roads and railroads.

Q. What conclusion did you reach as to the practicability of relocating that highway outside of the railroad right of way lines?

A. My conclusion was it could be located outside of the railroad right of way, but that the present road was the better alignment. It could be put over on the other side of the creek.

Q. Are there any very serious obstacles in the way of construction outside of the railroad right of way?

A. I could see none that were very serious, but it would entail considerable cost, but from an engineering stand-[fol. 172] point I believe it could be located on the south side if necessary.

Q. Would that be the most practicable location for it?

A. I believe it would.

Mr. St. Sure: What would be?

A. On the south side of the creek, that is, to get it off of the four hundred foot right of way of the Central Pacific Railroad Company.

Mr. Thunen:

Q. Mr. Harrold, some attack has been made upon the location of the line of the placing of the line of the old road survey 247 on this map. Now I will ask you, given two definite points, starting and closing and the evidence of an old road practically midway between and the notes which

you had in protracting the line of the old survey 247 upon this map, would or would not the factor of error be so great that you could not place the line upon the map with reasonable accuracy?

A. There is either one of two things in answering a question of that kind. If the beginning point and the ending point of the survey line as recorded are definite on the ground then if the road notes are fitted between those two points they can only set in certain places or else the road notes themselves are inaccurate.

[fol. 173] Q. Did you or did you not fit these lines in with the old survey on this map?

A. I fitted the initial and the ending points of the road notes of 247 on the map, the exact line, fitted the road in exactly between those two points. It could not be any different than is shown there and conform to the notes as recorded in the file of notes on 247.

Q. Did or did not your line as protracted conform to the configuration of the hill as exhibited there?

A. The line of the road 247 as shown there followed approximately parallel to the line of the railroad, the original railroad, as it is on the ground today, and follows the topograph that is followed by the railroad except it is a little higher in elevation. There is very little difference. There is very little difference in the line of the two roads.

The Court:

Q. Are you ready to say that the line of a road were constructed and run on that line of survey the road would not run where it ever ran before?

A. If it was run upon the ground as it is shown on the map I am satisfied that no road ever ran in that place. Is that what you mean, Judge?

Q. Yes.

A. Yes, I don't believe that a road was ever built as it is shown on that map. However, the notes put it there.

[fol. 174] The foregoing embraces all the evidence upon the issues to be raised on appeal.

The court found (Finding V) among other things that County Road No. 4974 was adopted March 27, 1911, and

that such parts of the old road No. 247 as were not expressly abandoned by the board of supervisors on that date, and now included within the limits of County Road No. 4974, are a part of the present traveled road.

Plaintiffs reserve an exception to this implied finding of a relation between old road 247 and the present traveled road in view of the further finding in the same paragraph that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with County Road No. 4974, or whether the highway traveled prior to 1911 followed the line of survey No. 247 for any distance whatever. This exception is hereby designated as Exception No. 10.

The court found further (Finding V) that physical conditions make it practically necessary to maintain the highway upon the railroad right of way.

To which finding plaintiffs reserve an exception upon the ground that there is no estoppel, and the right of way claimed under special Congressional grant cannot be made [fol. 175] to yield to the practical necessity or convenience of the county. For convenience this exception is hereby designated as Exception No. 11.

The court found (Finding V) that the defendant County of Alameda has expended for improvements and maintenance of the highway through Niles Canyon since 1911 more than $100,000, and that said highway is necessary for public accommodation.

To this finding plaintiffs reserve an exception upon the grounds stated in the exception last preceding, and upon the further ground that expenditures for maintenance of a previously established road are not material. For convenience this exception is hereby designated as Exception No. 12.

The court found and concluded, among other things, that Central Pacific Railway Company is the owner in fee of the railroad right of way through Niles Canyon, subject, however, to an easement in favor of the County of Alameda by reason of necessity to maintain its present highway through the Canyon, which easement is, nevertheless, subject to the terms and conditions of section 2 of the Act of Congress approved March 3, 1875, authorizing the railroad company to [fol. 176] take and occupy the highway for railroad purposes, upon providing a substitute highway at its own ex-

pense in the most favorable location and in as perfect a manner as the original road.

To this finding and conclusion of a removable easement or any easement held by the County of Alameda for highway purposes plaintiffs reserve an exception which is hereby designated as Exception No. 13.

Judgment was given and entered in accordance with the conclusions above recited. The judgment further quieted the title of Central Pacific Railway Company to all portions of the highway outside of Niles Canyon and within the railroad right of way. In due course plaintiffs presented their motion for an order setting aside and vacting that part of the judgment adjudging the fee title of Central Pacific Railway Company in and to the railroad right of way through Niles Canyon subject to an easement in favor of defendant the County of Alameda, and substituting therefor another and different judgment in respect of the said parcels of land in Niles Canyon so as to include the highway through Niles Canyon in the same category as the highway outside of the canyon and within the railroad right [fol. 177] of way, quieting the title of plaintiff Central Pacific Railway Company as against the defendants, and enjoining the defendants from claiming or asserting any right, title or interest whatever in or to the railroad right of way through Niles Canyon, and that the conclusions of law be amended accordingly. The motion was denied and plaintiffs then and there reserved an exception which is hereby designated as Exception No. 14.

Plaintiffs further in due course presented their motion for a new trial based upon (1) insufficiency of the evidence to sustain that part of the decision that the defendant County of Alameda owns or has an easement for highway purposes or otherwise on the railroad right of way through Niles Canyon; (2) that the decision is against law in the respect that it purports to make the title of plaintiffs granted by the Act of Congress approved July 1, 1862, subject to the limitations of the subsequent general right of way act approved March 3, 1875. (3) That the decision is against law in the respect that it purports to subject the title of plaintiffs to the necessity or convenience of the County of Alameda. (4) Error in law occurring at the trial and excepted to by plaintiffs. Said motion was denied

and plaintiffs reserved an exception which is hereby designated as Exception No. 15.

[fol. 178] ASSIGNMENT OF ERRORS

Plaintiffs specify the following errors of law which occurred at the trial:

1. The court erred in receiving the record of proceedings before the board of supervisors with reference to County Road No. 247, there being no authority at that time under the federal statutes whereby the county could acquire the right of way for a highway over public lands. (Exception No. 1.)

2. The court erred in refusing to strike the proceedings before the board of supervisors relative to road No. 247 for want of proof that the road was ever actually opened or accepted by the county or that a road ever did exist as contemplated by that petition and survey. (Exception No. 2.)

3. The court erred in overruling plaintiffs' objection to the question directed to County Surveyor Posey whether a highway could be constructed outside of the railroad right of way lines which would be reasonably safe, reasonably inexpensive, reasonably practicable, and at the same time accommodate the public. This, because as stated in the objection, the railroad right of way was granted by Congress for a specific and exclusive purpose, and for the further reason that the question embraces many factors for which no foundation has been laid, and was so vague as not [fol. 179] to be susceptible of a direct answer. (Exception No. 3.)

4. The court erred in overruling plaintiff's objection to the similar question addressed to Engineer Posey, the point being saved by Exception No. 4.

5. The court erred in overruling the objection to the question directed to Mr. Posey as to the cost of such a road, the objection being based upon lack of foundation in that the witness had made no investigation upon the ground. (Exception No. 5.)

6. The court erred in sustaining defendant's objection to the question directed to Mr. Posey on cross examination relative to lack or disrepair of the highway bridge across Alameda Creek. (Exception No. 6.)

7. The court erred in overruling plaintiffs' objection to the question whether the element of safety entered into the consideration whether a different road would be feasible. (Exception No. 7.)

8. The court erred in overruling plaintiff's objection to the question asked witness Posey as to the expenditures made in the maintenance of the existing highways through Niles Canyon; this upon the ground that no estoppel was pleaded and that estoppel will not lie in this case. (Exception No. 8.)

[fol. 180] 9. The court erred in overruling the objection to the question as to the expenditures in maintenance and repair of the Niles Canyon Road upon the ground that maintenance and repair of existing road are in no event ground of estoppel. (Exception No. 9.)

10. The court erred in its reference to Road No. 247 as having any relation with road No. 4974 or the present traveled road, in Finding V, in view of the finding in the same paragraph that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with county road No. 4974, or whether the highway actually traveled prior to 1911 followed the line of survey No. 247 for any distance whatever. (Exception No. 10.)

11. The court erred in its finding and conclusion that the railroad right of way through Niles Canyon is subject to the convenience or necessity of the defendant County of Alameda by reason of the physical conditions or otherwise. (Exception No. 11.)

12. The court erred in its conclusion that the County of Alameda had acquired any rights upon the railroad right of way through Niles Canyon by reason of the County's expenditures in maintenance of the highway. (Exception No. 12.)

[fol. 181] 13. The court erred in denying plaintiff's motion to set aside that portion of the judgment decreeing that the defendant Alameda County has an easement for highway purposes within the railroad right of way through Niles Canyon. (Exception No. 13.)

14. The court erred in denying plaintiffs' motion for a new trial for insufficiency of the evidence to support the finding as to such easement, or the finding as to the necessity therefor; for the error of law in subjecting the railroad right of way grant of July 1, 1862, to the terms of the Act of Congress approved March 3, 1875; for the error of law in subjecting the title of plaintiffs to the necessity or convenience of defendant County of Alameda: for the other errors of law occurring at the trial, excepted to by plaintiffs, and set forth in the bill of exceptions. (Exception No. 14.)

SPECIFICATIONS OF INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE DECISION

1. The evidence is insufficient to sustain the implied finding that there is any relation between old county road survey No. 247 and the present traveled highway through Niles Canyon.

2. The evidence is insufficient to sustain the finding that [fol. 182] it cannot be ascertained whether the survey for road 247 is identical in any particular with County Road No. 4974.

On the contrary, the evidence shows without conflict that there is no agreement whatever between Survey No. 247 and County Road No. 4974.

3. The evidence is insufficient to sustain the finding that topographical, geographical or other physical features or conditions in Niles Canyon make it practically necessary to maintain the county highway within the railroad right of way through Niles Canyon.

4. The evidence is insupcient to sustain the finding that the highway within the railroad right of way through Niles Canyon is necessary for public accommodation.

5. The evidence is insufficient to sustain the finding that the County of Alameda has or owns an easement for highway purposes by reason of necessity or otherwise within the railroad right of way through Niles Canyon.

[fol. 183] IN SUPERIOR COURT OF ALAMEDA COUNTY

STIPULATION AS TO BILL OF EXCEPTIONS

It is hereby stipulated that the foregoing bill of exceptions is full, true and correct; that the same contains all the evidence material to the issues presented therein, and that the same may be settled and allowed by the court.

Dated April 21, 1928.

Frank Thunen, Attorney for Plaintiffs: Earl Warren, District Attorney; Paul St. Sure, Assistant, Attorneys for Defendants.

IN SUPERIOR COURT OF ALAMEDA COUNTY

CERTIFICATE TO BILL OF EXCEPTIONS

I hereby certify the foregoing to be a full, true and correct bill of exceptions in the foregoing entitled cause; that the same contains all of the evidence material to the issues presented therein, and that the same is hereby settled, allowed and approved this 23rd day of April, 1928.

Eugene P. McDaniel, Judge.

[File endorsement omitted.]

[fol. 184] IN SUPERIOR COURT OF ALAMEDA COUNTY

STIPULATION AS TO TRANSCRIPT

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains full, true and correct copies of all papers and documents therein set forth and now on file in the office of the clerk of the County of Alameda, State of California; that the said transcript contains

a full and accurate copy of (1) the Judgment Roll, (2) the notice of appeal, and (3) the Bill of Exceptions heretofore settled by stipulation of the attorneys, and the certificate of the judge who tried the said cause: that the said foregoing papers shall constitute the transcript on appeal from the final judgment in this cause, which said judgment was rendered on the 17th day of August, 1927, and filed in said cause on August 19, 1927.

Dated June —, 1928.

Frank Thunen, Attorney for Plaintiffs and Appellants; Earl Warren, District Attorney; Paul St. Sure, Assistant, Attorneys for Defendants.

[fol. 185] Received a copy of the within Transcript on Appeal for the judge who presided at the trial of said cause.

Dated June 6th, 1928.

George E. Grass, Clerk. T. C. Stoddard, Deputy.

Due service of the within Transcript on Appeal is hereby admitted this 6th day of June, 1928.

Earl Warren, J. Paul St. Sure, Assistant, Attorneys for Respondents.

[fol. 186] In Supreme Court of California, Bank

1 Civ., 6871. S. F., 13041

Central Pacific Railway Company et al., Plaintiffs-Appt's,

vs.

County of Alameda, etc., et al., Defendants-Resp's

Order Transferring Cause—Filed Oct. 28, 1930

By the Court:

In the above entitled cause, now pending in the District Court of Appeal for the First Appellate District, and numbered therein 1st Civil 6871, copies of the several opinions in writing of the justices of said court having been forwarded to this court, and it appearing therefrom that said justices are unable to concur in a judgment in said cause,

It is ordered that the said cause be, and the same is hereby, transferred to this court for hearing and determination.

Waste, Chief Justice.

Dated October 28, 1930.

[File endorsement omitted.]

[fol. 187] IN SUPREME COURT OF CALIFORNIA

S. F. 13041. In Bank. April 27, 1931

CENTRAL PACIFIC RAILWAY COMPANY (a Corporation), and Southern Pacific Company (a Corporation), Plaintiffs and Appellants,

v.

COUNTY OF ALAMEDA (a Body Politic and Corporate), Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats, and William J. Hamilton, Members of the Board of Supervisors of said County; John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow, and Frederick Stow, Defendants and Respondents

[1] Highways—Public Lands—Counties—Railroads—Right of Way—Public Land Grants.—In this action by a railroad to quiet title to land upon which defendant county had maintained a highway since the year 1859, and which [fol. 188] was included in land granted to plaintiff by the so-called Pacific Land Grant Act enacted by Congress in 1862, plaintiff could not complain that the county had no authority to construct the road across public lands until the year 1866, which was after the grant to plaintiff, where the federal government had never objected to the construction or maintenance of the road.

[2] Id.—Railroads—Right of Way—Eminent Domain—Adverse Possession—Easements.—In such action, where the road was constructed through a deep canyon, and it appeared that the road had been maintained continuously in the same place since its construction, except for a portion which had been washed out by the stream in the canyon

and which had been replaced by a new road, which abandonment and construction occurred in the year 1911, and the highway had been improved by the expenditure of more than $100,000, and plaintiff did not object to the maintenance of the highway until the year 1925, and the maintenance of the highway in no manner interfered with the use of the land for the purpose for which it was given to plaintiff, the county had not only gained an easement by adverse user, but, under the circumstances, was entitled to an easement for the highway in its present location by reason of necessity and public convenience, the topography of the land being such that the construction of a highway which would not cross the land belonging to plaintiff would be extremely difficult, and, if constructed, would not best serve the public.

[3] Id.—Railroads—Right of Way—Statutory Construction.—In such action, where the county was entitled to maintain the highway over the easement gained by adverse user, it was immaterial whether or not an act of Congress of 1875, granting the public the right to occupy the unused portion of a railroad right of way granted by the government, through a canyon or defile, such as involved in the present action, where such highway is necessary for public accommodation, could be given a retrospective effect so as to entitle the county to maintain the highway over the right of way granted to plaintiff in 1862.

Appeal by plaintiffs from a judgment of the Superior Court of Alameda County, Eugene P. McDaniel, Judge, in an action to quiet title. Affirmed.

For Appellants: Frank Thunen.

For Respondents: Earl Warren, District Attorney of Alameda County; Paul St. Sure, Deputy District Attorney.

OPINION

By the COURT:

This case was appealed to this court and thereafter transferred to the District Court of Appeal in and for the First District. It was then assigned to Division One of said District Court of Appeal, and later transferred to this court for the reason that the concurrence of two jus-

tices of said District Court of Appeal in a judgment therein could not be obtained. Upon its submission to us we have carefully examined the briefs of counsel filed in the case and the opinions of the several members of the District Court of Appeal prepared by them when the appeal was before that court. After this examination we have arrived at the conclusion that the opinion of Mr. Justice Knight of said District Court of Appeal correctly expresses the views of this court upon the questions presented on this appeal, and we have therefore adopted said opinion, with slight modifications, as the opinion of this court. The opinion as thus approved and adopted by this court is as follows:

"The essential facts appearing in the record are as follows: For approximately seventy years the county of Alameda has maintained a public highway through and along the bottom of the Niles canyon from Niles to Sunol. It was laid out and declared to be such by the county in 1859, and has since served as one of the main arteries of travel between the bay regions of southern Alameda county and the Livermore valley. The canyon from Stony Brook, [fol. 189] about two miles east of Niles, easterly to Sunol is narrow, deep, rugged, about three miles long, and through it runs the Alameda creek; and owing to its steep cliffs it is impracticable to maintain a highway through it except along the bottom thereof. In 1862 Congress enacted the so-called Pacific Land Grant Act, whereby the Central Pacific Railroad Company was granted a right of way 400 feet wide over and across government lands in California to the Pacific coast, for the purpose of constructing along the center thereof a railroad and telegraph line to serve as a link in the first transcontinental railroad. Part of the route selected by said company was through the Niles canyon, which was then unappropriated public land; but on account of the narrowness of the canyon the right of way selected necessarily embraced within its boundaries part of the land occupied by the Alameda county highway. In 1868 said company finished building a single-track railroad through the canyon, over which it has since operated its trains; but the construction and operation of the railroad has never interfered with the free use of said highway.

"In 1910 or thereabouts, on account of the flood waters of the creek, the county was obliged to reconstruct much of its highway, and in doing so it moved a considerable stretch, lying about midway between Stony Brook and Sunol, within the railroad right of way and on the north side of the creek, to the south side of the creek and outside of the right of way; and in 1911 the discontinued portions were formally abandoned by the county, so that at the time this action was instituted the highway lay within the boundaries of the railroad right of way for a distance of about a half mile at the westerly end of the canyon and for the distance of about a mile and a half at the easterly end of the canyon. It also overlaps the right of way slightly at a point between the two stretches above mentioned and near the westerly end of the canyon; and it appears from appellants' map (plaintiffs' exhibit No. 6) that the highway crosses the railroad track twice, once at the extreme westerly end of the canyon, near Stony Brook, and again about a half mile west of the easterly end of the canyon. Since 1911 the county has expended more than $100,000 for the upkeep and improvement of said highway.

"In 1925 the appellant railroad companies brought this action to obtain a decree establishing in them title in fee simple to and right to the exclusive possession of those portions of the right of way now occupied by the public highway, and to oust the county therefrom, claiming that such title and right of possession was acquired by the Central Pacific Railroad Company under the Pacific Land Grant Act of 1862. The answer of the county urged, among other defenses, that by virtue of the facts above stated it had acquired an easement by reason of necessity over those portions of said right of way now occupied by its highway, and it asked for a decree accordingly.

"The trial court sustained the county's claim to such easement, finding in this regard that said highway was a public necessity and that 'the topographical, geographical and other physical features and conditions existing in the disputed portions of the right of way through Niles canyon, viz: the narrowness of the canyon, proximity of Alameda creek, which in the winter season becomes a torrential stream, sometimes capable of destroying bridges and roadways, and the steep sides of the canyon, make it practically necessary to maintain the highway through the dis-

puted territory because of the overwhelming difficulties to [fol. 190] substitute a different route in those places where the road is within the 200 foot limit from the center line of the main track of the railroad. * * *' It also found that except for those portions formally abandoned, the county in rebuilding the highway in 1910 or thereabouts followed substantially the line of the then existing road; but that it could not be ascertained from the evidence how much of the then existing road followed the line of the road constructed under the proceedings of 1859.

"After leaving the canyon the highway continues on easterly into San Joaquin county, following generally along and portions of it lying within the railroad right of way, title to which, and to a by-road intersecting the main highway near Stony Brook, appellants sought also by this action to quiet, and were granted an unqualified decree accordingly. But we are not concerned with that part of the decree on this appeal, because the county admits that beyond the walls of the canyon the topographical and other physical conditions are such as to make it unnecessary for the highway to occupy any portion of the railroad right of way.

"The trial court's conclusions of law were that the Central Pacific Railway Company is the owner of the paramount title in fee to the land now occupied by said highway and lying within the boundaries of said 400-foot right of way, 'subject to an easement in favor of defendant County of Alameda by reason of necessity to maintain its present right of way for highway purposes * * * subject, however, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States' (18 Stats. 482), declaring 'and the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass or defile, said railroad company shall,

before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road.' "

"Judgment was entered in conformity with the foregoing conclusions of law, and in applying the provisions of the Act of 1875 it was decreed that 'pursuant to the terms of said act of Congress, and under the paramount title of plaintiff Central Pacific Railway Company, plaintiffs may enter upon the whole or any part of all or any of said (three) parcels of land (lying within said right of way and designated in the findings as parcels D, E and F) and exclude the defendants and all thereof, and all persons claiming to or to claim under the defendants or any thereof, from the possession of the whole or any part of all or any of said parcels hereinabove designated as parcel D, parcel E and parcel F; provided, however, that plaintiffs shall first reconstruct, at their own expense or at the sole expense of either thereof, in the most favorable location and in as perfect a manner as the original road, such portion or portions of the said original road as may be repossessed by the plaintiff to the exclusion of the defendants.'

[fol. 191] "The record shows beyond question that all of the proceedings for the establishment of a public highway from Niles to Sunol were taken by the county and completed long before the enactment of the Pacific Land Grant Act of 1862, and consequently long prior to the time the railroad acquired any rights whatever in the canyon. In this regard the trial court found 'that in the year 1859 defendant Alameda County surveyed and laid out through the Niles canyon, under survey No. 247, a county road which was the same year declared by the board of supervisors of said county to be a public highway'; and part of the evidence supporting the finding shows that pursuant to a petition presented to the board in November, 1858, survey No. 247 was made by the board and filed in May, 1859; and that after due notice and hearing the board declared the road as surveyed and located to be a public highway and directed that it be opened forthwith. The proceedings above mentioned substantially complied with the requirements of the earlier statutes under which public highways were established (Stats. 1850, p. 200;

Stats. 1855, p. 192); and there would appear to be nothing in the record to justify the belief, as appellants claim, that the highway contemplated by survey No. 247 was never constructed, unless, perhaps, it be the map prepared by appellants' engineers and introduced in evidence as part of appellants' case (plaintiffs' exhibit No. 6), which places the line of the road up along the side of the canyon, where no trace of a road could be found. But the correctness of the line delineated on said map may be seriously doubted in view of the testimony showing the impossibility of relocating the line of the road laid out by the old survey with any degree of certainty from the notes thereof, because the survey was made pursuant to methods long since discarded as inaccurate; and furthermore, the monuments to which the survey was tied have long since disappeared. In opposition to the map and as showing that a highway was constructed pursuant to the survey of 1859 the record discloses the uncontradicted testimony of two old settlers, one of whom had been a resident of Sunol since 1858, and who testified that he traveled over the completed road through the canyon in 1862 and continuously thereafter. The other had been a resident of Niles since 1863, and he testified that he traveled over the completed road through the canyon as early as 1863 and continuously thereafter; and both testified that except for changes necessitated by the flood waters of the creek, which resulted in shifting a portion of the road from the north to the south side of the creek, the line of the present road corresponds in every particular with the old road as they traveled it in the early sixties. These changes were covered by the abandonment proceedings in 1911. And the trial court found in effect, and the evidence shows, that although the highway called for by survey No. 247 did not remain in its original location throughout its entire length, the 'parts of the old road numbered 247 not expressly abandoned by the board of supervisors on said date (March 27, 1911) and not included within the limits of the county road No. 4974 (constructed in 1911) are part of the present traveled road'.

[1] "True, the original highway was built over government land prior to the passage of the congressional act of 1866, which for the first time granted rights of way 'for the construction of highways over public lands not

reserved for public use'; but the government has never [fol. 192] objected to the legal status of the highway, and as said in the case of Town of Red Bluff v. Walbridge, 15 Cal. App. 770, in dealing with a similar situation: 'As against the federal government it (the county here) could not perhaps make a public highway over its lands without its consent or acquiescence, but the federal government is not complaining, and its policy has always been to encourage the building of highways over the public domain, thereby facilitating its settlement and use, and this policy was crystallized into a statute passed on the 26th day of July, 1866. * * *'

[2] "Appellants contend, however, that the effect of the intervening Land Grant Act of 1862 was to extinguish any prospective rights the county may have acquired to a public highway through the canyon and to vest absolutely in the railroad exclusive ownership in fee of a right of way 400 feet wide through the canyon, no part of the area of which was thereafter subject to easement by the county; and that, therefore, notwithstanding the urgent necessity for the easement and the admitted fact that the railroad company knowingly allowed the highway to remain on those portions of its right of way now in dispute and to be traveled continuously for upwards of sixty years, and to be improved by the expenditure thereon of more than $100,000, the county acquired no rights whatever therein. I cannot agree with appellants' contention in this respect.

"As to the nature and extent of appellants' title, it may be stated that the Land Grant Act of 1862 was one of several passed by Congress in the early sixties, granting unto various railroads rights of way over government lands, and in all of them the language used in granting the rights of way and in specifying the conditions upon which the grants were made are substantially the same. These acts have been construed at different times by the federal and state courts, and while no case identical in facts to those here presented has been cited, the legal principles employed in those cases in measuring the extent of the title granted by said acts must necessarily be applied here in determining the rights of the respective parties; and when so applied clearly demonstrate, in my opinion, that no such absolute title to or right of exclusive possession in the public domain

as is here claimed was ever acquired by or intended to be granted to the railroads under said acts, for if it were, the investiture of such title would have barred the public from ever afterwards encroaching in any manner upon any portions of any of said rights of way, notwithstanding that such encroachments were of urgent public necessity and would in no manner interfere with the special purpose for which said rights of way were granted to the railroads. Obviously such is not the law, as the authorities hereinafter cited will show. The contention of exclusive ownership here made was heretofore advanced by the Union Pacific Railroad Company with reference to the title it acquired under this very Act of 1862, in the early case of Union Pac. R. R. Co. v. Leavenworth etc. Ry. Co., 29 Fed. 728, wherein it sought to prevent the construction of a crossing over its right of way; and in ruling adversely upon such contention Judge Brewer said: 'Even if it were conceded that Congress had the power to enter the territory of a state and, for any purpose, establish a line through its center over which the state had no right of crossing—a sort of Chinese wall, dividing the state into two portions, inaccessible to each other, a concession I should never be willing to make—it is clear to my mind that [fol. 193] no assertion of such power was ever contemplated by Congress in the Pacific railroad legislation.'

"It is conceded that whatever measure of title the government granted vested in praesenti as of the date of the approval of the acts (Railroad Co. v. Baldwin, 103 U. S. 426; Union Pac. R. R. Co. v. Laramie Stock Yards, 231 U. S. 190); also that no adverse title can be acquired by the public in said rights of way which might have a tendency to impair or destroy the full enjoyment thereof by the railroad companies (H. A. and L. D. Holland Co. v. Northern Pac. Ry. Co., 214 Fed. 920). Furthermore, up to 1912 (at which time an act of Congress was passed, as will hereinafter appear, affecting the title granted to the Union Pacific Railway Company) it was held that under no circumstances could an individual or other private interest acquire title by adverse possession to any portion of said rights of way (Northern Pac. Ry. Co. v. Townsend, 190 U. S. 267). But manifestly by granting said rights of way the government did not divest itself of all ownership therein. As held in the Townsend case, supra, which involved a construction of the act of 1862: "In effect the grant was one of a limited fee,

made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted''; and in further limitation of the fee the courts have held that neither the whole nor any portion of the rights of way thus granted may be alienated by the railroads, nor voluntarily dedicated by them to any public use (Holland case, supra); and by the terms of the act of 1862 itself it is provided that '* * * Congress may at any time having due regard for the rights of said (railroad) companies named herein, add to, alter, amend, or repeal this act.' Moreover, it has been consistently held that in the cases of public necessity such rights of way are at all times amenable to the police power of the state and subject to the state's right of eminent domain, provided that in the exercise thereof the special purpose of the grant to the railroad is not thereby impaired. In this regard the Townsend case, supra, declares: 'Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed * * *' The Holland case, supra, holds to the same effect, it being there said: 'Upon the one hand, the implication is clear that Congress intended that the right of way should be held and used exclusively for railroad purposes, and upon the other, it is fair to assume, it was not desired that the use be in disregard of the rights and convenience of those who should take up their abode along its course. It must have been contemplated that highway and other crossings would, in the very nature of things, be required, and in view of the self-evident need therefor, together with what must have been a common and well-understood practice of making provision for them in railroad operation, it is reasonable to suppose that the grant was made with the implied consent that ways of necessity, both public and private, might be laid out across the right of way at such places and under such conditions as would not unreasonably impair its usefulness for [fol. 194] the purpose for which it was created.' Again, in

the case of Union Pacific R. R. Co. v. Leavenworth etc. Ry. Co., supra, it is expressly held that the rights of way granted under the act of 1862 are not placed beyond the reach of the power of the state's right of eminent domain, citing several earlier cases. And in the case of North Coast Ry v. Northern Pacific Ry. Co., 48 Wash. 529, the same doctrine is definitely restated as follows: 'It has also been repeatedly held by other courts that a right of way of a railroad company, which has been acquired for that express purpose through a federal grant, is not exempt from the operation of state laws of eminent domain. (Northern Pac. R. Co. v. St. Paul etc. R. Co., 1 McCrary 302; Union Pac. R. Co. v. Burlington etc. R. Co., 1 McCrary 452; Union Pac. R. Co. v. Leavenworth etc. R. Co., 29 Fed. 728; Illinois Cent. R. Co. v. Chicago etc. R. Co., 26 Fed. 477.)' Additional cases to the same effect are Union Pacific R. Co. v. Burlington etc. R. Co., 3 Fed. 106; Northern Pac. R. Co. v. St. Paul etc. R. Co., 3 Fed. 702; Northern Pac. Ry. Co. v. Spokane, 64 Fed. 506. In fact, as said in the Leavenworth etc. Ry. Co. case, supra, the question of the power of the state to exercise the right of eminent domain, under the conditions above stated, as to the right of way of a railroad granted by the government 'can hardly be considered as an open one'. Therefore, if under the state's police power, and subject to the conditions above stated, the public may acquire easements in railroad rights of way over government lands, through the exercise of the right of eminent domain, it would seem wholly illogical to hold in the present case that the same character of easements, subject to the same conditions, may not be acquired by the public by adverse user extending over a long period of years, without being compelled in the end to resort to the legal proceedings incident to the exercise of the right of eminent domain; because the right to the easement is founded on the doctrine of public necessity, and if it be entitled to the easement as a matter of right, the method of its acquisition would seem to be of little consequence so long as it conformed to the requirements of local state laws.

"Appellants contend, however, that the principle of the cases relied upon by the county to sustain its claim to an easement has no application here because those cases involve only crossings over the rights of way as distinguished from longitudinal or parallel encroachments such as we have here; and in this regard it is said that 'no case has

been called to our attention which would in the slightest degree justify the encroachment here in question'. It would seem, however, that the case of North Coast Ry. Co. v. Northern Pac. Ry. Co., supra, is just such a case. There the latter company, like the Central Pacific here, was one of the grantees named in one of these land grant acts; and it selected a right of way and laid its track along the Yakima river, through a deep, narrow, mountain ravine in the state of Washington. The North Coast Railway Company sought to parallel said track for a limited distance through the ravine, over the unused portion of and within the boundaries of the other railroad's right of way, there being no other feasible route over which the North Coast Company could build the road; and it was contended there, as it is here, that the rule governing crossing cases had no application to longitudinal encroachments. But the court held directly to the contrary, saying: 'It is true the most, if not [fol. 195] all, of the last-cited cases related to crossings of other railways over a right of way acquired by federal grant, whereas the tract here sought is not for mere crossing purposes but is a longitudinal tract about three-fifths of a mile in length, to be carved out of claimant's right of way. The principle as to the power of eminent domain is, however, the same in both cases, depending upon the necessities of the occupying railway and those of the public service. This court has held that a longitudinal portion of a right of way may be condemned by another railway corporation where the occupying railway does not actually need it, and where it is needed by the other in the interest of the public service. Seattle & Montana R. Co. v. Bellingham Bay & Eastern R. Co., supra. It is, therefore, held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the necessities of the two companies in the interest of the public service is sufficient to warrant it.'. And in construing the language hereinabove quoted from the Townsend case, the court said: 'It seems clear from the quotation last made that the Federal Supreme Court recognizes the power of the state to determine whether the whole of a right of way which has been created by Federal grant through an act of Congress is actually needed as against the requirements of public serv-

ice, which arise with the increase of commerce and transportation necessity.'

"An analysis of the decision in the case of H. A. and L. D. Holland Co. v. Northern Pac. Ry. Co., supra, cited by appellants as sustaining their position, shows that it is not at variance with the foregoing views. The vital point there decided was that the grant to the railroads of a limited fee in rights of way over government lands carried with it no power to dedicate any portion of said rights of way for use as public streets or townsites; and that no individual claim of ownership in such rights of way, based upon an attempted dedication could be sustained; nor under such circumstances could the railroad company be estopped from afterwards asserting the full measure of the title granted to it by the government. It is true that in that particular case the court refused to apply the rule governing crossing cases to the longitudinal encroachment there involved; but the reason for such refusal was, as the decision clearly shows, that the element of public necessity for the encroachment, upon which the doctrine of the crossing cases is founded, was entirely lacking; but nowhere in the decision does the court pretend to declare a general rule that all longitudinal encroachments are to be excluded from the operation of the rule governing crossing cases. On the contrary, the court in this regard said: 'We do not say that a case is inconceivable where, for a limited distance, some concession may not properly be made for this or an analogous purpose (a longitudinal encroachment); but the necessity must be great and the conditions unusual in the extreme to warrant it.' In the case at bar the findings and the evidence show beyond question an imperative necessity for the Niles Canyon highway, because besides furnishing the sole means of ingress to the property situate along the railroad within the canyon, it serves as the only feasible way of uniting two important and well-populated regions of the state, and therefore is vital to their development and progress.

"Furthermore, in the Holland case, one of the reasons suggested why the rule governing crossing cases should not be extended generally to longitudinal encroachments was that the latter imposed 'a much greater burden than a mere

[fol. 196] crossing, for it is practically exclusive of both possession and use by the railroad company, while a crossing only qualifies or temporarily interrupts such possession and use.' If the term 'greater burden' was there used in a legal sense, the correctness of the statement cannot be challenged; but if thereby the court meant that generally speaking all longitudinal encroachments create a greater physical burden on said rights of way than crossings, there is much room for difference of opinion, because it is a matter of common knowledge, in this day of heavy and continuous automobile traffic over the highways of the state, both for commercial purposes and pleasure, that highway crossings over railroads are a constant menace to life and property, and that vast sums of money are being expended daily by the railroads, the state, and the counties, jointly, to eliminate such crossings; whereas no such danger surrounds longitudinal encroachments such as we have here. Therefore it would seem to be an unreasonable rule which would hold that where the highway crosses the railroad track, with all of its attending dangers, it constitutes a lawful encroachment, but where for a limited distance it runs parallel with the track and is not surrounded with the dangers of a crossing, it constitutes an unlawful encroachment. Furthermore, as already shown, the fundamental reason for the rule permitting crossings in any case is to prevent one part of a state from being walled off from another; and it follows necessarily that if it be essential to unite two areas of the state with a highway, it can make little difference in principle whether in so doing the connecting highway be laid across the railroad track in an open country or parallel with the track for a short distance, through a mountain pass or ravine; and certainly the latter is attended with far less dangers, both to the railroad company and the public, than a crossing.

"In further support of the theory that a public easement may not be acquired by adverse user, appellants quote from the Townsend case, supra, which in turn quotes from the case of Northern Pac. R. R. Co. v. Smith, 171 U. S. 260, to the effect that 'by granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance,' and that such determination is not open to judicial review. But the rule there stated is

restricted by the express language of both decisions to cases of individuals claiming title by adverse possession for private purposes, as distinguished from cases of the public claiming adverse title by reason of public necessity. In this regard the decision in the Townsend case, supra, reads: 'The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.' And in the case of Northern Pacific R. R. Co. v. Smith, supra, the restrictive wording of the decision is: 'By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant,' etc. The cases of Southern Pacific Co. v. Hyatt, 132 Cal. 240, and Heilbron v. St. Louis S. W. Ry. Co., 52 Tex. Civ. App. 575, 113 S. W. 610, were [fol. 197] likewise actions brought by individuals to establish title by adverse possession, for private purposes. And the rule quoted from Jones on Easements is not pertinent here for the reason that none of the cases cited by the author of that work, in support of the rule, relate to railroad rights of way over government lands. Appellants rely upon language found in the Holland case, supra, to the effect that the 'entire right of way' of the railroad can neither be condemned nor dedicated for street purposes. Such, no doubt, is the established law, the reason therefor being that condemnation or dedication of the entire right of way would defeat the very purpose for which the right of way was granted to the railroad. But this element does not enter into this case, for as shown the action here is purely one to quiet title, based upon the claim of exclusive ownership, and consequently nowhere in their complaint do appellants allege or claim that the existence of said highway ever has interfered with the operation of their railroad, or their program of railroad expansion, nor that it is likely to do so in the future.

[3] "Furthermore and aside from the doctrines of eminent domain and adverse user above discussed, the provisions of the act of 1875 quoted above expressly confer upon the public the right to occupy the unused portion of a rail-

road right of way granted by the government, through a canyon or defile, such as we have here, where such highway is necessary for public accommodation. Appellants contend, however, that the provisions of that act cannot apply here unless they be given retrospective operation, which legally may not be done, the contention being based mainly upon the proposition that the grant of the right of way to the railroad under the act of 1862 vested instanter upon the approval of said act, and that therefore Congress had not the power subsequently to enact legislation affecting said grant; and the cases of Union Pacific R. R. Co. v. Laramie Stock Yards, supra, and Union Pacific R. R. Co. v. Snow, 231 U. S. 204, have been cited as supporting this proposition. I do not understand such to be the effect of the decision in either of those cases. On the contrary it appears therefrom that in 1912 Congress did enact legislation which had the direct effect of depriving the Union Pacific R. R. Co. of certain unused portions of the rights of way previously granted to it under this very act of 1862, and the right of Congress so to do was not challenged. In this regard, the court in the Laramie Stock Yard case first points out that under the act of 1862 the grantee railroads had no power to alienate any portion of their rights of way, nor individuals or other private interests acquire title to any portion thereof by adverse possession; and the court then goes on to say that in order to correct 'this defect of power in the companies and the defect of right in the possessors of the right of way' the act of 1912 was enacted, (which as stated was limited in its operation to the Union Pacific R. R. Co.) and which provided first that all conveyances and agreements 'theretofore made' by the Union Pacific R. R. Co. or its successors or assigns of or concerning land forming part of its right of way under the act of 1862, etc., were legalized, validated, and confirmed, etc.; and secondly, that in all instances in which title or ownership of any part of said right of way theretofore mentioned was 'claimed' as against said company or its successors or assigns, 'by or through adverse possession of the character and duration prescribed by the laws of the state in [fol. 198] which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead

of being granted as a right of way.' But as will be seen from an examination of the opinion in that case, the question there raised and decided was not whether in 1912 Congress had power to pass laws affecting rights of way previously granted, but, first, whether the act of 1912 controlled as to conveyances and agreements made by the grantee railroad prior to the approval of said act as well as to those made subsequently; and secondly, whether the provisions of the act of 1912 conferring upon individuals the right to acquire title against the railroad by adverse possession, applied to cases where the period of the statute had run, fully or in part, prior to the time of the approval of the act, or only to those cases where the full period of the statute had run subsequent to the approval of the act. And it was held that because of the explicit language used in the act relating to conveyances and agreements 'theretofore made' by the railroad, the provisions thereof validating such conveyances and agreements were to be given a retrospective operation; but that in the absence of any such qualifying language relating to the acquisition of the title by adverse possession the provisions of the statute having reference thereto were to be given a prospective operation; in other words, that the latter provisions were available only in those cases where the full requisite statutory period of adverse possession had run subsequent to the approval of said act, and not in cases where such period of time had run either fully or partly prior to the approval of the act. In both of the cases cited the full period of time fixed by the statute had run prior to the approval of the act, but admittedly had not run subsequent thereto (the causes having been submitted to and decided by the Supreme Court in 1913, about a year after the approval of the act). Consequently the judgments there under review which were based upon those admitted facts were reversed. But in neither case was it held, as appellants contend, that the provisions of the act of 1912 were inoperative and ineffectual against rights of way previously granted under the act of 1862; and indeed such a conclusion would have been directly contrary to the very purpose and the express language of the 1912 act. It follows, therefore, that if in 1912 Congress had power to enact valid legislation controlling the right of possession to unused portions of rights of way granted by the government under the act of 1862,

it was surely vested with the same power in 1875. And a comparison of the two acts will demonstrate that the act of 1875 was far less reaching in its effect against the railroads than the act of 1912, because obviously the purpose and effect of the act of 1875 was to confer upon the railroads the power to take or retake exclusive possession of the entire area of the rights of way and to oust the public therefrom, provided they complied with the conditions stated in the act; while the manifest purpose and effect of the provisions of the act of 1912 relating to adverse possession was to deprive the railroad permanently of those portions of its right of way which it had permitted individuals to occupy adversely for the limited statutory period, the theory upon which this subsequent legislation was evidently based being that only a limited fee in said rights of way was granted to the railroads in the begin- [fol. 199] ning and that the remainder of the fee was reserved in the government, over which it still had the right of control and disposition.

"Appellants further contend that the language employed in the enactment of the statute of 1875 shows that its provisions were not intended to apply to rights of way granted under the previous special land grant acts such as the act of 1862. While there is much force in the argument advanced in support of this contention, it would appear that there is reasonable ground for sustaining the trial court's conclusion to the contrary. But even assuming that the act of 1875 does not so apply, the county is nevertheless clearly entitled to a decree under the doctrine of adverse user, establishing its easement in those portions of the right of way now occupied by its highway, leaving for further determination the question of the superior need of those portions of the right of way, in case appellants should claim that the same were essential to the convenient operation of its railroad. As said in the Holland case, supra, 'Public use implies an underlying necessity, and the fundamental consideration, therefore, is that of superior need.'

"Appellants in their briefs have signified a willingness to enter into an agreement with the county to allow the highway to remain in its present location, provided the county recognizes appellants' exclusive title to the land occupied thereby and their right to exclude the county

therefrom whenever they deem such land necessary for the convenient operation of their railroad. But according to the cases heretofore cited, it may be seriously questioned whether under the terms of their grant appellants have the power to enter into any such agreement; and it is also extremely doubtful whether the county, being given only a 'limited right of user' of the disputed land, would have any legal right to expend any public funds whatever for the improvement of a road over the railroad's property. In any event, the legal rights of the respective parties will be hereafter measured by the terms of the judgment to be rendered in the action, rather than by anything which may be stated in the briefs, and in this regard it must be remembered that appellants are seeking a decree to quiet title to the disputed portions of the right of way and to oust the county therefrom. Therefore, conceding the good faith of the propositions made in appellants' brief, the determination of the legal problem here presented cannot be affected or influenced thereby."

The judgment is affirmed.

[fol. 200] IN SUPREME COURT OF CALIFORNIA, IN BANK

S. F. No. 13041

CENTRAL PACIFIC RAILWAY CO.

vs.

COUNTY OF ALAMEDA, etc.

ORDER DENYING REHEARING—Filed May 25, 1931

By the COURT:

The petition for a rehearing in the above entitled cause is denied.

Dated May 25, 1931.

Seawell, Acting Chief Justice.

[File endorsement omitted.]

[fol. 201] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 202] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,072. California Supreme Court. Term No. 258. Central Pacific Railway Company and Southern Pacific Company, petitioners, vs. County of Alameda, Chas. W. Heyer, Ralph Richmond, et al., etc. Petition for a writ of certiorari and exhibit thereto. Filed July 24, 1931. File No. 36,072.